IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 65

TIMOTHY J. BREEN,

Petitioner,

v.

SELECTIVE SERVICE LOCAL BOARD No. 16, *et al.*,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INDEX

Chronological list 1

Agreed Statement on Appeal Pursuant to Rule 76 of the Federal Rules of Civil Procedure 1

- Statement of the Case 1
- Findings of Fact 4
- Conclusions of Law 4
- Order Appealed From 5
- Points Relied on by the Appellant 5
- Text of letter and Memo on the Draft 8
- Memorandum of decision of U.S. District Court 12

Opinion of U.S. Court of Appeals 22

Washington, D. C. THIEL PRESS 202 393-0625

CHRONOLOGICAL LIST

February 20, 1968	Complaint filed
March 1, 1968	Motion for Preliminary Injuction filed.
March 8, 1968	Motion to Dismiss filed
March 8, 1968	Hearing before Hon. William H. Timbers
March 13, 1968	Findings of Fact and Conclusions of Law filed by Hon. William H. Timbers
January 10, 1969	Decision of U.S. Court of Appeals for the Second Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TIMOTHY J. BREEN,
Plaintiff

v. CIVIL ACTION NO. 12,422

SELECTIVE SERVICE LOCAL BOARD NO. 16, BRIDGEPORT CONNECTICUT AND BRIG. GEN. ERNEST E. NOVEY, INDIVIDUALLY AND AS DIRECTOR OF THE SELECTIVE SERVICE SYSTEM FOR CONNECTICUT,
Defendants

AGREED STATEMENT ON APPEAL PURSUANT TO RULE 76 OF THE FEDERAL RULES OF CIVIL PROCEDURE

STATEMENT OF THE CASE

1. Plaintiff is a male citizen of the United States and of the State of Connecticut, 20 years of age. He is and has been a registrant under the Selective Service System of the United States.

2. Defendant Local Board No. 16, Bridgeport, Connecticut, is a duly constituted Local Board of the United States Selective Service System and is and has been the Local Board of the Plaintiff.

3. Defendant Brig. Gen. Ernest E. Novey is and has been the Director of the Selective Service System for Connecticut.

4. Prior to January 8, 1968, the Plaintiff was classified as II-S (student deferment) under the applicable provisions of the Selective Service Act and Regulations, and at all times relevant hereto, the Plaintiff alleges and is prepared to prove that he has been a full-time student at the Berkeley School of Music in Boston, Massachusetts.

5. On November 16, 1967, at a demonstration at the Arlington Street Church in Boston, Plaintiff along with others delivered his Selective Service Registration Card to a clergyman for the sole purpose of protesting United States involvement in the war in Vietnam.

6. In October, 1967, the National Director of the Selective Service System issued the letter and memorandum attached hereto and herein incorporated by reference.

7. On January 9, 1968, Defendant Local Board No. 16 caused to be mailed to Plaintiff a Delinquency Notice (SSS Form 304) informing him that on January 8, 1968, he had been declared delinquent for failure to have his Registration Certificate in his possession. Simultaneously (on January 9, 1968) Plaintiff was reclassified from Class II-S to Class I-A. The Plaintiff's complaint alleges that this action was taken pursuant to the terms of said directive.

8. On January 11, 1968, Defendant Local Board No. 16 caused to be mailed to Plaintiff an order to report for armed forces physical examination (SSS Form 223) on January 29, 1968. Thereafter, at Plaintiff's request, physical examination was postponed to March 4, 1968, and again postponed to a date as yet unspecified.

9. On uncertain date early in February, 1968, Plaintiff appealed to the Selective Service Appeals Board from his

reclassification. No disposition of said appeal has been made to date.

10. Thereafter, on February 20, 1968, Plaintiff instituted this suit asking the Court, *inter alia*, to declare that the designation of Plaintiff as delinquent and his reclassification are null and void; to enjoin Defendants from taking further steps to induct or reclassify him on the basis of his turning in his draft card; to declare Sections 1602.4 and 1642.1–1642.46 of the Selective Service Regulations unconstitutional on their face or as applied in this case; to declare as void the Directive of General Lewis B. Hershey dated October 24, 1967; and for $20,000 damages.

11. On March 1, 1968, Plaintiff obtained a temporary restraining order restraining Defendants, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, from directly or indirectly ordering or implementing the induction and processing of the Plaintiff, by physical examination or otherwise, for induction into the armed services of the United States.

12. On March 1, 1968, Plaintiff filed a Motion for Preliminary Injuction which was ordered set down for hearing on March 8, 1968.

13. On March 8, 1968, Defendants filed a Motion to Dismiss for lack of jurisdiction relying upon 50 App. U.S.C. 460(b)(3) as amended by Public Law 90-40, June 30, 1967, and Plaintiff filed a Motion for Convening of Three-Judge Court and For Extension of Temporary Restraining Order, relying upon 28 U.S.C. 2282.

14. All of the motions referred to in Paragraphs 12 and 13 above came on for hearing and were heard on March 8, 1968, by the Honorable William H. Timbers who, after hearing and argument, dissolved the Temporary Restraining Order and subsequently, on March 13, 1968, filed the attached Memorandum of Decision containing the following findings of fact which are not in dispute and the following conclusions of law.

FINDINGS OF FACT

1. On November 16, 1967, Plaintiff delivered his Selective Service Registration Certificate to a clergyman in Boston, Massachusetts, for return to the Government.

2. On January 9, 1968, Plaintiff's draftboard, located in Bridgeport, Connecticut, mailed him a Delinquency Notice, informing him that on January 8, 1968, he had been "declared delinquent" because of "Failure to have Registration Certificate in your possession."

3. Also, on January 9, 1968, Plaintiff was reclassified from Class II-S (student deferment) to Class I-A.

4. On January 11, 1968 he was ordered to report for a preinduction physical, but at his request, the examination was transferred to Boston, Massachusetts and postponed until March 4, 1968.

5. The Board's actions were entirely by virtue of the draft regulations.

6. The Plaintiff has not exhausted his administrative remedies.

CONCLUSIONS OF LAW

1. 28 U.S.C. 1343 does not confer jurisdiction of this action upon the United States District Court.

2. Section 8(c) of the Military Selective Service Act of 1967, amending Section 10(b) (3) of the Universal Military Training and Service Act (50 App. U.S.C. 460(b) (3)), specifically deprives the United States District Court of whatever jurisdiction it might otherwise have over this action.

3. 28 U.S.C. 2282 does not require the convening of a three-judge district court to consider the jurisdictional question in this case, since this is in order only when a complaint seeks an injunction against enforcement of an Act of Congress and not merely regulations promulgated pursuant thereto.

4. 28 U.S.C. 2201 does not confer jurisdiction but merely creates a remedy where jurisdiction otherwise exists.

5. This action arises under the Constitution and laws of the United States, and 28 U.S.C. § 1331 would generally confer jurisdiction if the matter in controversy exceeded the sum of $10,000 exclusive of interest and costs, unless the Court is otherwise deprived of jurisdiction.

6. The presence of standards explicit in the Board's regulations permits the registrant to know exactly what conduct will result in Board action.

7. In order to invoke a three-judge court under 28 U.S.C. 2282, the plaintiff's complaint must not only raise a substantial question as to the constitutionality of a federal statute but seek an injunction against its enforcement, which the Plaintiff has not done with respect to Section 8(c) of the Military Service Act of 1967.

ORDER APPEALED FROM

"ORDERED that:

(1) Plaintiff's motion for a preliminary injunction is denied.

(2) Plaintiff's motion for the convening of a three-judge district court is denied.

(3) Plaintiff's complaint is dismissed for lack of subject matter jurisdiction, but without costs."

POINTS RELIED ON BY THE APPELLANT

1. The surrender of a Selective Service Registration Certificate is an act of speech and expression which is protected by the First Amendment to the Constitution of the United States.

2. The declaration of the Plaintiff as delinquent by the defendant Board, and its reclassification of the Plaintiff constituted punitive action taken in direct response to his act of expression of protest against the Vietnam war, punitive action which will have a chilling effect on the exercise of First Amendment rights by the Plaintiff and others

similarly situated, as well as inhibiting the future exercise of these rights.

3. The declaration of the Plaintiff as delinquent and his reclassification by the defendant Board were wholly without or contrary to pertinent statutory and constitutional authority and/or exceeded said authority.

4. The declaration of the Plaintiff as delinquent and his reclassification in the manner and for the reasons above stated, i.e., without indictment, arraignment, trial or conviction, constituted a denial of due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

5. The declaration of the Plaintiff as delinquent and his reclassification in the manner and for the reasons above stated violated the guarantees of freedom of speech, assembly, association and the right to petition for redress of grievances, contained in the First Amendment to the United States Constitution.

6. The declaration of the Plaintiff as delinquent and his reclassification in the manner and for the reasons above stated constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

7. The declaration of the Plaintiff as delinquent and his reclassification in the manner and for the reasons above stated constituted discrimination and denial of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

8. Sections 1602.4 and 1642.1 - 1642.46 of the Selective Service Regulations under which Plaintiff was declared delinquent, are unconstitutional on their face and as applied to the Plaintiff, in that they violate the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, *inter alia*, for vagueness, absence of standards, overbreadth, inequality of application, and denial of due process.

9. The Hershey Directive above described purporting to set forth guidelines to local boards, such as defendant, for reclassification of registrants who "abandon" their draft cards or who engage in demonstrations or other acts which are not in the "national interest" is unconstitutional on its face and as applied by the defendant Board against the Plaintiff.

10. The Hershey Directive above described by purporting to combine executive, legislative and judicial powers within a single administrative agency, violates the constitutional principle of separation of powers and is therefore void on its face and as applied.

11. The Hershey Directive above described is in conflict with the statutes, rules and regulations governing selective service procedures, and therefore illegal and unenforceable against the Plaintiff.

12. Section 8(c) of the Military Selective Service Act of 1967, amending Section 10(b)(3) of the Universal Military Training and Service Act (50 App. U.S.C. 460(b)(3)) is unconstitutional on its face and as applied in this case.

13. 28 U.S.C. 2282 requires that the jurisdictional issue in this case be heard by a three-judge district court convened in accordance with 28 U.S.C. 2284.

The parties hereto, through their respective counsel, hereby agree that the foregoing statement of the case contains those facts which they consider to be essential to a decision of the issues involved by the United States Court of Appeals for the Second Circuit.

Lawrence P. Weisman
Emanuel Margolis
Attorneys for Appellant
Jon O. Newman
Attorney for Appellees

The foregoing statement is hereby approved this 15th day of April, 1968.

William H. Timbers
United States District Judge

APPENDIX A

New York Times, Thursday November 9, 1967.

TEXTS OF LETTER AND MEMO ON THE DRAFT

Washington, Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum, dated Oct. 24, from General Hershey on draft cards:

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in

the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state

headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV F or 1 Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with sound procedure.

Memorandum

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification

1) Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state director of the board of origin is outside the state.

2) Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class 1 O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class 1 O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Filed Mar. 13, 1968]

TIMOTHY J. BREEN,

Plaintiff,

v. Civil No. 12,422

SELECTIVE SERVICE LOCAL BOARD NO. 16, BRIDGEPORT, CONNECTICUT AND BRIG. GEN. ERNEST E. NOVEY, INDIVIDUALLY AND AS DIRECTOR OF THE SELECTIVE SERVICE SYSTEM FOR CONNECTICUT,

APPEARANCES

Lawrence P. Weisman, of Cohen & Wolf, Bridgeport, Conn., and Emanuel Margolis, Stamford, Conn., for plaintiff.

Jon O. Newman, U.S. Atty., Hartford, Conn., for defendants.

MEMORANDUM OF DECISION

ON PLAINTIFF'S MOTIONS FOR A PRELIMINARY INJUNCTION AND FOR THE CONVENING OF A THREE-JUDGE DISTRICT COURT AND ON DEFENDANT'S MOTION TO DISMISS

In this action brought to challenge defendants' right to induct plaintiff into the armed forces, plaintiff has moved for a preliminary injunction to restrain defendants from continuing to process him for induction. Defendants oppose this motion and have moved for dismissal of the complaint on the ground that jurisdiction is lacking in this Court. Because the Court agrees that plaintiff's complaint fails to state a cause of action over which the Court has jurisdiction, plaintiff's motion for a preliminary injunction is denied and the complaint is dismissed. Plaintiff's motion

for the convening of a three-judge district court to consider the issues here presented is also denied.

On November 16, 1967, plaintiff delivered his draft card to a clergyman in Boston, Massachusetts, for return to the government. Allegedly the sole purpose of this act was to protest United States involvement in the war in Vietnam.

The Military Selective Service Act of 1967, 50 App. U.S.C. § 451 et seq., authorizes the President of the United States to prescribe necessary rules and regulations to carry out its provisions. 50 App. U.S.C. § 460(b)(1). Pursuant to this authorization, Sections 1617.1 and 1623.5 of the Selective Service regulations (32 C.F.R. §§ 1617.1 and 1623.5 (1967)) require a person registered and classified by the selective service to have at all times in his personal possession his Registration Certificate and a valid [illegible] of Classification. Both items are commonly refer[illegible] as draft cards. In addition, § 1602.4 of the regulat[illegible] C.F.R. § 1602.4 (1967)) defines a "delinquent" as "a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law." Sections 1642.1-1642.46 (32 C.F.R. §§ 1642.1-1642.46 (1967)) govern the treatment of delinquents. In relevant part they provide that a person failing to perform any duty required under the law may be declared a delinquent by the Board. (32 C.F.R. § 1642.4(a) (1967)). When this is done the Board must send a Delinquency Notice to the registrant setting forth the duty which the registrant has failed to perform. (32 C.F.R. § 1642.4(b) (1967)). Once having declared a registrant delinquent the Board may proceed to reclassify the registrant into Class I-A (32 C.F.R. § 1642.12 (1967)), and having done so, the Board must order him to report for induction before all others, even before volunteers (32 C.F.R. §§ 1642.13 and 1631.7 (1967)).

On January 9, 1968, plaintiff's Draftboard, located in Bridgeport, Connecticut, mailed him a Delinquency Notice, informing him that on January 8, 1968, he had been

"declared delinquent" because of "Failure to have Registration Certificate in your possession." Also on January 9, 1968, plaintiff was reclassified from Class II-S (student deferment) to Class I-A. On January 11, 1968, he was ordered to report for a pre-induction physical, but at his request, the examination was transferred to Boston, Massachusetts and postponed until March 4, 1968.

Plaintiff filed the original complaint in this action on February 20, 1968. On March 1, 1968, plaintiff filed a substituted complaint and the instant motion for a preliminary injunction. Plaintiff also sought and obtained at that time an ex parte temporary restraining order.

A hearing was held on March 8, 1968 on plaintiff's motion for a preliminary injunction. Also filed and heard at that time was plaintiff's motion for the convening of a three-judge district court pursuant to 28 U.S.C. § 2282 to consider the request for a preliminary injunction and for the extension of the temporary restraining order until the three-judge district court could act. In addition, defendants' counsel filed, and the Court heard, a motion to dismiss the complaint for lack of jurisdiction.

At the conclusion of the hearing the Court dissolved the temporary restraining order but otherwise reserved decision on the pending motions.

Plaintiff's complaint avers that the draftboard was without jurisdiction to declare plaintiff a delinquent and to reclassify him, and that its conduct is so doing was unconstitutional. The Board's actions, plaintiff claims, were meant as a penalty and will have the effect of inhibiting the exercise of First Amendment rights by himself and others. Plaintiff also attacks the regulations described above as being unconstitutional on their face and as applied, claiming that they violate the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Plaintiff further claims that his reclassification into Class I-A simultaneously with the mailing to him of notice that he was "delinquent" and prior to his receipt

of that notice violated Selective Service regulations and due process of law. Finally, plaintiff contends that his reclassification resulted from an improper "directive" concerning reclassification sent by the Director of the Selective Service System, Lt. Gen. Lewis B. Hershey, to draftboards on October 26, 1967.

Plaintiff asks the Court in his complaint to declare that the designation of plaintiff as delinquent and his reclassification are null and void; to enjoin defendants from taking further steps to induct or reclassify him on the basis of his turning in his draft card; to declare the Selective Service regulations referred to above unconstitutional on their face and as applied; and to declare the Hershey "directive" void on its face and as applied. Plaintiff also demands $20,000 in damages.

The threshold question raised by plaintiff's complaint and motion for a preliminary injunction and brought into focus by defendants' motion to dismiss is whether plaintiff states a cause of action over which this Court has jurisdiction.

Plaintiff claims jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 2201, and asserts that the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States including 42 U.S.C. §§ 1981 and 1983.

It is clear that 28 U.S.C. § 2201 does not confer jurisdiction but merely creates a remedy where jurisdiction otherwise exists. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

Nor is 28 U.S.C. § 1343 of any help to plaintiff. Subsections (1) and (2) of that provision only confer jurisdiction in instances where damages are sought with respect to violations of 42 U.S.C. § 1985; plaintiff does not allege, nor could he properly allege, a violation of that section. Subsection (3) applies only where a state law, statute, ordinance, regulation, custom or usage is involved; none of these is involved here. Subsection (4) confers jurisdiction

where relief is sought under an Act of Congress providing for the protection of civil rights. The only such laws relied upon by plaintiff, 42 U.S.C. §§ 1981 and 1983, require state action; no state action is alleged here. See *Oestereich v. Selective Service System Local Bd. No. 11*, ___ F. Supp. ___ (D. Wyo. Feb. 6, 1968), *aff'd*, ___ F.2d ___ (10 Cir. Feb. 21, 1968).

Nevertheless, this action does arise under the Constitution and laws of the United States and as such 28 U.S.C. § 1331 would generally confer jurisdiction if the matter in controversy exceeded the sum or value of $10,000, exclusive of interest and costs. Although plaintiff alleges that the action involves the requisite jurisdictional amount and seeks to recover $20,000 in damages, a very real question exists whether the necessary amount is in fact in controversy. See *Wolff v. Selective Service Local Bd. No. 16*, 372 F.2d 817, 826 (2 Cir. 1967). *Cf. Oestereich v. Selective Service System Local Bd. No. 11, supra.*

But assuming the requisite jurisdictional amount has been sufficiently demonstrated, the Court is convinced that § 8(c) of the Military Selective Service Act of 1967, amending Section 10(b)(3) of the Universal Military Training and Service Act (50 App. U.S.C. § 460(b)(3)), specifically deprives this Court of whatever jurisdiction it might otherwise have over this action.

Prior to its amendment in June, 1967, Section 10(b)(3) provided that decisions of local draftboards with respect to classifications "shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." The United States Supreme Court in *Estep v. United States*, 327 U.S. 114, 122-23 (1946) interpreted this to mean that:

> ". . . Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the Courts are not to weigh the evidence to determine whether the classification made by the

> local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Having thus defined the narrow scope of judicial review, the Court proceeded to interpret Congressional intent as to when that review could take place. After *Falbo v. United States,* 320 U.S. 549 (1944), it appeared that a registrant could not even defend a criminal prosecution under the Act on the ground that his Board's classification action was without jurisdiction; rather, review could come only by way of habeas corpus after his actual induction. But in *Estep* the Court held that where all administrative remedies had been exhausted, the defense could be raised in a criminal prosecution for the simple reason that Congress could not have intended to require "the Courts to march up the hill when it is apparent from the beginning that they will have to march down again." *Id.* at 125. The court, however, was careful to point out that it was only this practical reason which resulted in its conclusion, stating that:

> "We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive." *Id.*

Implicit in the Court's reasoning is that Congress, in the context of the Selective Service System, can constitutionally limit judicial review of administrative action to a point in time subsequent to the institution of criminal proceedings or actual induction of the registrant. This principal was again recognized by the court in *Witmer v. United States,* 348 U.S. 375, 377 (1955).

Several courts, however, without questioning Congressional power to provide otherwise, have held that Section 10(b)(3) did not deprive them of jurisdiction to review classification prior to the exhaustion of administrative

remedies and the institution of criminal proceedings.

Most notable of these cases was *Wolff v. Selective Service Local Bd. No. 16, supra,* a decision by the Court of Appeals for this Circuit. The plaintiff in that case was attempting to challenge his delinquency status and reclassification which resulted from his participation in demonstrations against United States involvement in Vietnam. Judge Medina, having found that Section 10(b)(3) did not deprive the court of jurisdiction, then held that the facts of the case warranted the court's setting aside its own doctrines of justiciability and exhaustion of administrative remedies.

Of particular relevancy was the court's finding that the Board's action was completely without authority of any regulation and as such constituted a "chilling effect" upon the exercise of "fragile and sensitive" constitutional rights within the purview of *Dombrowski v. Pfister,* 380 U.S. 479 (1965). *Id.* at 824. The facts of the instant case are, of course, quite different from those in *Wolff.* Here the Board's actions were entirely by virtue of regulations. The existence of a standard permits the registrant to know exactly what conduct will result in Board action and as such, the far-reaching "chilling effect" feared by the court in *Wolff* is non-existent. Thus even if the first premise of *Wolff,* that Section 10(b)(3) did not deprive this Court of jurisdiction, were still valid, the Court would feel compelled in this instance to decline to intervene until plaintiff had completely exhausted his administrative remedies.

But that first premise of *Wolff* does not have the force of authority which it would otherwise have for this Court in view of Congressional action taken since that decision. That action was the amendment of Section 10(b)(3) in June, 1967 by Section 8(c) of the Military Selective Service Act of 1967 so as to read as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12

> of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." 50 App. U.S.C. § 460(b)(3)

Whatever doubt there was as to Congressional intent concerning the former Section 10(b)(3) has thus now been eliminated.

Plaintiff aruges that Congress merely intended to codify such cases as *Wolff.* That just the opposite is true is plainly expressed by the report of the Armed Services Committee of the House of Representatives with respect to the amendment:

> "The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System." H. Rep. No. 267, 90th Cong. 1st Sess., 7 U.S. Cong. News 1489 (1967)

It is therefore clear that because plaintiff has not exhausted his administrative remedies and has not yet been ordered to report for induction, this Court lacks jurisdic-

tion to entertain plaintiff's complaint. *Oestereich v. Selective Service System Local Bd. No. 11, supra; Carpenter v. Hendrix,* ___ F. Supp. ___ (N.D. Ga. Nov. 14, 1967) (36 U.S. Law Week 2349); *Moskowitz v. Kindt,* 273 F. Supp. 646 (E.D. Pa. 1967).

In view of *Estep v. United States, supra,* and *Witmer v. United States, supra,* plaintiff's claim that Congress cannot constitutionally force a registrant to await criminal proceedings or actual induction to test the validity of his classification is without merit. Whether the amendment intends to preclude the use of habeas corpus and, if so, whether it would therefore be unconstitutional, is not in issue here as plaintiff has not yet been inducted into the armed services and is not bringing this action upon a petition for a writ of habeas corpus. *Moskowitz v. Kindt, supra,* at 648-49.

Plaintiff has moved for the convening of a three-judge district court pursuant to 28 U.S.C. § 2282 and contends that a single judge is without power even to dismiss the complaing for lack of jurisdiction. First, assuming there were federal court jurisdiction, 28 U.S.C. § 2282 requires the convening of a three-judge district court only when a complaint seeks an injunction against the enforcement of an Act of Congress and not when the injunction is sought against the enforcement of regulations promulgated pursuant to a general authorization contained therein. *Sardino v. Federal Reserve Bank of New York,* 361 F.2d 106, 113-116 (2 Cir. 1966). Secondly, it is not only within the power of, but it is incumbent upon, the single judge to whom the application is made to determine whether there is any basis for federal jurisdiction. *Cf. Idlewild Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962). If in the course of making that determination, the construction and constitutionality of a federal statute is drawn into question, as plaintiff attempted to do here with respect to Section 8(c) of the Military Selective Service Act of 1967, the Court is not required by 28 U.S.C. § 2282 to halt its determination and convene a three-judge district court to con-

sider the matter. Not only must the complaint on its face raise a substantial question as to the constitutionality of a federal statute but it must also seek an injunction against its enforcement, neither of which is done by plaintiff's complaint with respect to Section 8(c) of the Military Selective Service Act of 1967. See, *Flemming v. Nestor*, 363 U.S. 603, 606-08 (1960). Therefore, plaintiff's motion for the convening of a three-judge district court must be denied.

ORDER

ORDERED that:

(1) Plaintiff's motion for a preliminary injunction is denied.

(2) Plaintiff's motion for the convening of a three-judge district court is denied.

(3) Plaintiff's complaint is dismissed for lack of subject matter jurisdiction, but without costs.

Dated at New Haven, Connecticut, this 13th day of March, 1968.

/s/ William H. Timbers
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 47—September Term, 1968.

(Argued September 17, 1968 Decided January 10, 1969.)

Docket No. 32345

TIMOTHY J. BREEN,

Plaintiff-Appellant,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Defendants-Appellees.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal by a Selective Service registrant, who had held a student deferment and was reclassified 1-A because of delinquency for failing to have a registration certificate in his possession, from an order of the District Court for Connecticut, William H. Timbers, *Chief Judge*, dismissing for want of jurisdiction a complaint seeking to enjoin his induction. Affirmed.

EMANUEL MARGOLIS, Stamford, Conn. (Lawrence P. Weisman, Bridgeport, Conn.), *for Appellant.*

JON O. NEWMAN, United States Attorney, Hartford, Conn., *for Appellees.*

FRIENDLY, *Circuit Judge*:

Plaintiff Breen, a 20-year old resident of Connecticut, is a registrant under the Selective Service System. He had held a II-S (student) deferment, 50 U. S. C. App. §456 (h)(1), 32 C. F. R. §1622.25, because of being an undergraduate at the Berkeley School of Music in Boston. In mid-November, 1967, he delivered his Selective Service Registration Certificate to a clergyman in Boston for the purpose of protesting United States involvement in the war in Vietnam. On January 9, 1968, his Local Board mailed him a notice, 32 C. F. R. §1642.4(b), that he had been declared a delinquent for failure to have the Certificate in his possession as required by 32 C. F. R. §1617.1. At the same time the Local Board reclassified him from Class II-S to Class 1-A because of his delinquency, pursuant to 32 C. F. R. §1642.12, which authorizes such reclassification "regardless of other circumstances." These actions of the Board were in line with a memorandum and a letter dated respectively October 24 and 26, 1967, from the Director of Selective Service. The Local Board ordered Breen to report for a physical examination on January 29 but subsequently postponed this. Apparently Breen did not seek a personal appearance under 32 C. F. R. §1642.14. However, he appealed his reclassification under that same section.

In February 1968 Breen brought this action in the District Court for Connecticut, seeking a judgment that the

declaration of his delinquency and his reclassification were null and void, an injunction against his induction into the armed forces, and $20,000 damages. Although jurisdiction was predicated on 28 U. S. C. §§1331, 1343 and 2201, only the first could afford a basis.[1] The Government moved to dismiss the complaint and Breen to have a three-judge court convoked. Believing that the court was deprived of jurisdiction by §8(c) of the Military Service Act of 1967, 81 Stat. 104, which amended §10(b)(3) of the Selective Service Act, 50 U. S. C. App. §460(b)(3), by including the provision set forth in the margin,[2] Chief Judge Timbers, in a considered opinion, granted the Government's motion and denied Breen's.

After the decision of the district court, Breen's administrative appeal was denied and he was ordered to report for induction, but the order was stayed pending the determination of this appeal. When the appeal reached us in September, we deferred decision because the Supreme Court had set for early argument *Oestereich* v. *United States*, No. 46, October Term, 1968, which also involved the applicability and validity of the amendment to §10(b)(3) although in a somewhat different context.

We now have the benefit of the Court's decisions in *Oestereich*, —— U. S. —— (1968), 37 L. W. 4053, holding the amendment inapplicable to a claim by an exempt theo-

---

1 Plaintiff sought to meet the requirement of jurisdictional amount by a conclusory statement that the matter in controversy exceeds the value of $10,000 exclusive of interest and costs. See *Wolff* v. *Local Board No. 12*, 372 F. 2d 817, 826 (2 Cir. 1967). The Government has made no point about this, nor shall we.

2 No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . . .

logical student that the delinquency regulations could not be applied to him, and in *Clark* v. *Gabriel*, —— U. S. —— (1968), 37 L. W. 3217, holding the amendment valid and applicable to the rejection of a claim of conscientious objection. While neither decision reads precisely on the issue here tendered, applying their teaching as best we can, we affirm the judgment of the district court.

Oestereich, a student at a theological school preparing for the ministry, who had been declared delinquent for having turned in his registration certificate, was entitled under §6(g) to an exemption from military service and not merely to a deferment of his obligation. The element critical to the holding that the amendment to §10(b)(3) was inapplicable in his case was the Court's view that:

> Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption.

Since the Board's action in depriving a divinity student of the exemption which was his "statutory right" was therefore "blatantly lawless" and "involved a clear departure by the Board from its statutory mandate," to read the statute as forcing Oestereich to choose between induction and a criminal prosecution before he could vindicate his rights would be "to construe the Act with unnecessary harshness."

In contrast, §6(h)(1) of the Selective Service Act, 50 U. S. C. App. §456(h)(1), dealing with the deferment of undergraduates, on which Breen relies, directs:

> Except as otherwise provided in this paragraph, the President shall, *under such rules and regulations as*

> *he may prescribe,* provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. (Emphasis supplied.)

While 32 C. F. R. §1622.25 provides for the placing of undergraduates in Class II-S, §1642.12, promulgated by the President on July 4, 1967, Ex. Order No. 11360, 32 F. R. 9794, authorizes their removal from that classification on a declaration of delinquency. Arguments that this provision offends the "Except as otherwise provided" language with which §6(h)(1) begins or that the "rules and regulations" must be relevant to the deferment (e.g., the obtaining of certain grades), collide with the fact that in the last sentence of §6(h)(1)[3] Congress expressly recognized the long-standing provision for reclassification and early induction of delinquents with respect to student deferments. This is clear evidence that Congress did not suppose that reclassification pursuant to the delinquency regulations would violate the provision of §6(h)(1) that

> Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action.

The conflict between statute and regulations that arose in *Oestereich* is therefore not present here.

---

3 The congressional committee reports on the extensive amendments to the Selective Service Act in 1967 explicitly take note of the existence of the delinquency regulations. S. Rep. No. 209, 90th Cong., 1st Sess. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess. 17.

We consequently find no sufficient justification in this case for denying to the words of the 1967 amendment to §10 (b)(3), see fn. 2, the meaning which they so plainly have and which the Committee reports, set forth in the dissenting opinion in *Oestereich*, —— U. S. at ——, show they were intended to have. As recognized in Mr. Justice Harlan's concurring opinion in *Oestereich*, —— U. S. at ——, fn. 7, "Section 10(b)(3) was likely precipitated by the Second Circuit's well publicized decision in Wolff v. Selective Service Local Board No. 16, 372 F. 2d 817 (1967)." See, to the same effect, the dissenting opinion of Mr. Justice Stewart, joined by Justices Brennan and White, —— U. S. at —— & fn. 5. If Congress meant to withhold the preinduction review we had granted in *Wolff* to students enjoying deferments who had been declared delinquent for acts not within the regulations, it surely must have intended to do this where, as here, there has been an undisputed violation of 32 C. F. R. §1617.1 requiring continued possession of a certificate—a requirement which the Supreme Court has characterized as serving "a legitimate and substantial purpose in the system's administration." *United States* v. *O'Brien*, 391 U. S. 367, 378 (1968). As said by Mr. Justice Douglas, the author of *Oestereich*, in his concurring opinion in *Clark* v. *Gabriel, supra*, —— U. S. at ——, "it takes the extreme case where the Board can be said to flout the law, as it did in Oestereich v. Selective Service, ante, p. ——, to give preinduction review of its actions."

The argument that the Board "flouts the law" so as to require preinduction review of its actions whenever its proceedings are claimed to violate the Constitution, although these were consistent with the Selective Service Act, was rejected *sub silentio* in *Gabriel*. Although the opinion in that case did not specifically refer to any constitutional

issues raised, the Government's Jurisdictional Statement shows that Gabriel asserted violations of First and Fifth Amendment rights, and also apparently claimed that the Selective Service system involves unconstitutional delegations of the legislative, executive, and judicial powers. The Court could readily have passed only on such of Gabriel's points as did not require inquiry into the findings of fact or exercise of discretion of the individual Board. Instead, acting under §10(b)(3), it refused to consider any of Gabriel's claims, saying

> We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction.

We do not intimate that Breen's claims that his reclassification because of the return of his certificate violated his First Amendment rights to protest, as to which see *United States* v. *O'Brien, supra,* and his Fifth Amendment rights to adequate standards and notice, are not substantial. We hold only that they must be asserted in the ways to which Congress plainly limited him, to wit, refusal to submit to induction or post-induction habeas corpus.

It remains only to add that the decision that a three-judge court was not required was correct. Breen did not seek an injunction "restraining the enforcement, operation or execution" of §10(b)(3), 28 U. S. C. §2282; rather the Government raised that statute as a bar. See *Int'l Ladies Garment Workers Union* v. *Donnelly,* 304 U. S. 243, 251

(1938); *Flemming* v. *Nestor*, 363 U. S. 603 (1960); *Petersen* v. *Clark*, 285 F. Supp. 698 (N. D. Calif. 1968).

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

I respectfully dissent.

The underlying issue in plaintiff's action is whether the Selective Service delinquency procedure, as applied to a registrant who is delinquent because he protests national policy, is proper. It is now clear that such delinquency reclassification is not lawful if the registrant so treated happens to qualify for a statutory exemption. In *Oestereich* v. *Selective Service System Local Board No. 11*, 37 U. S. L. W. 4053 (U. S. Dec. 16, 1968), five members of the Supreme Court characterized use of the delinquency procedure in that situation as "basically lawless," making the local draft boards "free-wheeling agencies meting out their brand of justice in a vindictive manner."[1] A sixth member

---

1 We can find no authorization for that use of delinquency. Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Solicitor General confesses error on the use by Selective Service of delinquency proceedings for that purpose.

We deal with conduct of a local Board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board

of the Court, Mr. Justice Harlan, concurred in the holding that the delinquency reclassification in that case was improper and characterized as "nonfrivolous" the arguments made there that the entire procedure was unconstitutional "punishment." *Id.* at 4056 n. 6. Therefore, there can be no doubt that the basic question that plaintiff seeks to raise—whether he was ordered inducted by an illegal procedure—is substantial, even though he has not yet been able to convince a court that it should decide the issue.

The precise question before us is whether plaintiff is now entitled to such a judicial forum without making the harsh and risky choice of defying induction (and inviting criminal prosecution) or of submitting to induction and attempting to obtain habeas corpus. In *Oestereich*, the Court construed section 10(b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. §460(b)(3), to relieve the registrant of that dilemma; in *Clark* v. *Gabriel*, 37 U. S. L. W. 3217 (U. S. Dec. 16, 1968), it did not. As an inferior federal court, we must attempt to follow the teaching of these cases, as my brothers point out. However, doing so leads me to a contrary result.

---

member might be better served. See *Townsend* v. *Zimmerman*, 257 F. 2d 376. In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. As the Solicitor General suggests, such literalness does violence to the clear mandate of §6(g) governing the exemption. Our construction leaves §10(b)(3) unimpaired in the normal operations of the Act. [37 U. S. L. W. at 4054.]

It is true that *Oestereich* involved an *exemption* for divinity students, which the local board "blatantly" disregarded, while here plaintiff relies on a *deferment* for undergraduates. But that deferment is quite plain in the statute; section 6(h)(1) of the Military Selective Service Act of 1967, 50 U. S. C. App. §456(h)(1), provides:

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under

> the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Thus, Congress has explicitly made it national policy to provide deferments for "persons satisfactorily pursuing a full-time course of instruction at a college," which continue until the student reaches the age of 24 or obtains his degree, unless his studies are unsatisfactory. Moreover, such deferments are not to be "substantially restricted or terminated" unless the President finds "that the needs of the Armed Forces require such action." This is about as clear a statement of congressional intent as you can get, made all the more emphatic by its appearance in the Selective Service Act for the first time in the 1967 amendments.[2]

---

2 See Davis & Dolbeare, Selective Service: Present Impact and Future Prospects, 1967 Wis. L. Rev. 892, 909; Note, Changes in the Draft: The Military Selective Service Act of 1967, 4 Colum. J. L. & Soc. Prob. 120, 136-37 (1968). Prior to 1967, the President was authorized —not required—to provide for such deferment of students as was "found to be necessary to the maintenance of the national health, safety, or interest," former 50 U. S. C. App. §456(h); by regulation the deferment of individual students was left to the discretion of the local board, see former 32 C. F. R. §1622.25.

I cannot satisfactorily distinguish this case from *Oestereich*. Each involves a clear statutory grant by Congress to a specified class of registrants of the right not to be inducted into military service, although in this case the right is referred to as a deferment rather than an exemption. The Court's observations in *Oestereich* are therefore equally apt here:

> Since the exemption granted divinity students is plain and unequivocal and in no way contested here, and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type. [Footnote omitted.]

37 U. S. L. W. at 4054-55. Indeed, the applicability of the reasoning of *Oestereich* to the situation here was clearly foreseen by the three dissenting Justices in that case.[3]

In reaching a contrary view, my brothers rely on that portion of section 6(h)(1) which qualifies the statutory command for student deferments as subject to "such rules and regulations as [the President] may prescribe." But

---

3 The dissenters wrote, 37 U. S. L. W. at 4058 n. 9:

> The Court seems to limit its holding to statutory "exemptions"; yet "deferments" may just as "plainly" preclude a registrant's induction. See, *e.g.*, 50 App. U. S. C. §456(h)(1) (Supp. III, 1968); 32 CFR §1622.25 (1968) (full-time college students).

Cf. *Kimball* v. *Selective Serv. Local Bd. No. 15*, 283 F. Supp. 606, 608 (S. D. N. Y. 1968) (enjoining induction of plaintiff): "It is submitted that the distinction attempted to be drawn by the Government between an 'exemption' under §456(g) and a 'deferment' under §456(h) is one without legal significance." A notice of appeal from a similar subsequent order involving a different plaintiff in the same case has been filed in this court. No. MR 2219, 2d Cir., Aug. 13, 1968.

that clause is itself qualified by the introductory phras in the first sentence, "Except as otherwise provided in thi paragraph." The paragraph does, as already noted, other wise provide both that student deferments shall continu until the occurrence of specified events and also that suc deferments shall not be "substantially restricted" by th President unless he finds that "the needs of the Arme Forces" require it.[4] The former limitation is not relie on by the Government. As to the latter, I see no suc finding in Executive Order No. 11360, 32 Fed. Reg. 978 9794 (1967), relied on by the majority. Moreover, it woul seem that authority to promulgate "rules and regulations would extend only to those which would sensibly be relevan to the deferment, e.g., the obtaining of certain grades referred to by the majority, the furnishing of proof of bon fide undergraduate status, or the definition of a "full-time student. My brothers also rely on the fleeting reference i the last sentence of section 6(h)(1) to "delinquents," whic does not deserve the significance attributed to it. The Selec tive Service System made a similar argument in *Oestereic* without success. Finally, the fact that the requirement c continued possession of a registration certificate serves a legitimate purpose is beside the point. The underlying issu is whether the proper agency to "punish" transgressions c that rule is a court, under traditional safeguards, or an un fettered draft board, consisting of "part-time uncom pensated members," in a proceeding essentially "non judicial." 37 U. S. L. W. at 4056 (Harlan, *J.*).

The foregoing analysis of *Oestereich* and its effect o this case is strengthened by close examination of the Court'

---

4 See Note, Changes in the Draft: The Military Selective Service Ac of 1967, 4 Colum. J. L. & Soc. Prob. 120, 140 n. 158 (1968).

COPY BOUND C

decision on the same day in *Clark* v. *Gabriel, supra.*[5] In that case, the registrant's draft board rejected his claim to classification as a conscientious objector; the Court held that section 10(b)(3) prevented review until after induction or criminal prosecution. The Court in *Gabriel* distinguished *Oestereich* as follows, 37 U. S. L. W. at 3217:

> In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being "sustained by the local board." . . .
>
> Here the board has exercised its statutory discretion to pass on a particular request for classification, "evaluating evidence and . . . determining whether a claimed exemption is deserved." Oestereich v. Selective Service System Local Board No. 11, ante, p. ——. A local board must make such a decision in respect of each of the many classification claims presented to it. To allow pre-induction judicial review of such determinations would be to permit precisely the kind of "litigious interruptions of procedures to provide

5 This was a *per curiam* opinion by four members of the Court. Mr. Justice Douglas filed a separate concurrence, the dissenters in *Oestereich* concurred for the reasons they expressed in that case, and Mr. Justice Black thought that probable jurisdiction should be noted and the case set down for argument.

LOSE IN CENTER

necessary military manpower" . . . which Congress sought to prevent when it enacted §10(b), (3).

The differences between this case and *Gabriel* are clear. In *Gabriel,* the registrant's right to his classification depended "upon an act of judgment by the board." No such discretionary decision is involved here. Section 6(h)(1) contains no similar condition that a registrant's claim for student deferment be "sustained by the local board"; in any event, there is no doubt that Breen was a full-time student at a college. Therefore, whether the registrant in *Gabriel* raised constitutional issues, as the majority states, is not crucial. What is more significant is that in *Gabriel,* unlike both this case and *Oestereich,* the action of the draft board "inescapably involves a determination of fact and an exercise of judgment."

In short, I believe this case is governed by the reasoning in *Oestereich.* If the registrant there was entitled before induction to a judicial hearing on his claims, he should get no less here.[6] Accordingly, I would remand to the District Court for Connecticut for that purpose.

---

6 It should be noted that the same result would be reached if the approach of Mr. Justice Harlan in *Oestereich* were adopted. Plaintiff here, like the plaintiff in *Oestereich,* contends "that the procedure employed by the board is invalid on its face." 37 U. S. L. W. at 4055. Similarly, such a claim

> does not invite the court to review the factual and discretionary decisions inherent in the "classification or processing" of registrants and does not, therefore, present opportunity for protracted delay. . . . [I]t presents an issue beyond the competence of the Selective Service boards to hear and determine.

Id. at 4055-56.

Supreme Court of the United States

No. 1144 ---- , *October Term, 19* 68

Timothy J. Breen,

Petitioner,

v.

Selective Service Local Board No. 16,
Bridgeport, Connecticut, et al.

ORDER ALLOWING CERTIORARI. Filed April 28 ---------- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 10 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 65

TIMOTHY J. BREEN,

Petitioner,

—vs.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EMANUEL MARGOLIS
25 Bank Street
Stamford, Connecticut

LAWRENCE P. WEISMAN
955 Main Street
Bridgeport, Connecticut

MELVIN L. WULF
156 Fifth Avenue
New York, New York

Attorneys for Petitioner

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes and Regulations Involved 3

Statement of the Case 3

Reasons for Granting the Writ 7

Introduction 7

A. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich* v. *Selective Service Local Board No. 11*, 37 U. S. L. Week 4053 8

B. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face and as applied 13

C. Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment and the Sixth Amendment 15

D. Certiorari should be granted to decide whether the punitive use of delinquency and reclassification procedures, as in this case, is authorized by statute or regulation 18

PAGE

E. Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague and overbroad 21

F. Certiorari should be granted to decide whether petitioner's surrender of his Registration Certificate was an act of speech protected by the First Amendment 23

CONCLUSION 26

TABLE OF AUTHORITIES

Cases:

Aptheker v. Secretary of State, 378 U. S. 500 (1964) .. 22
Armendariz v. Hershey, 37 U. S. L. Week 2461 (D. W. Tex., Feb. 5, 1969) 13, 14

Bartchy v. United States, 319 U. S. 484 (1943) 16

Clark v. Gabriel, 37 U. S. L. Week 3217 6
Clark v. Uebersee Finanz-Korporation, 332 U. S. 480 (1947) 3
Cramp v. Board of Public Instruction, 368 U. S. 278 (1961) 22

Dombrowski v. Pfister, 380 U. S. 479 (1965) 22, 23, 25

Eagle v. United States ex rel. Samuels, 329 U. S. 304 (1946) 16

Harris v. Ross, 146 F. 2d 355 (5th Cir. 1944) 17

PAGE

Kennedy v. Mendoza-Martinez, 372 U. S. 144 (1963) ..15, 16, 17

Kimball v. Selective Service Local Bd. No. 15, 283 F. Supp. 606 (S. D. N. Y. 1968) 13

NAACP v. Button, 371 U. S. 415 (1963) 22, 24

Oestereich v. Selective Service Local Board No. 11, 37 U. S. L. Week 4053 .....4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17

Public Utilities Commission v. United States, 355 U. S. 534 (1958) 14

Sherbert v. Verner, 374 U. S. 398 (1963) 24
Stromberg v. California, 283 U. S. 359 (1931) 23, 25

Thomas v. Collins, 323 U. S. 516 (1945) 24, 25
Thornhill v. Alabama, 319 U. S. 88 (1940) 24
Tinker, et al. v. Des Moines Independent Community School District, 37 U. S. L. Week 4121 24

United States v. O'Brien, 391 U. S. 367 (1968) 23, 24

West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) 23-24
Wolff v. Selective Service, 372 F. 2d 817 (2nd Cir. 1967) 18, 22

U. S. Constitution:

First Amendment 2, 3, 7, 21, 23, 24, 25

Fifth Amendment 15

Sixth Amendment 2, 15

PAGE

Statutes and Regulations:

28 U. S. C. §1254(1) 2

Military Selective Service Act of 1967:

Section 1(c), 50 App. U. S. C. §451(c) 18

Section 6(g) 13

Section 6(h) 13

Section 6(h)(1), 50 App. U. S. C. §456(h)(1) 2, 3, 10, 12

Section 6(h)(2) 14

Section 6(m) 18

Section 10(b)(3), 50 App. U. S. C. §460(b)(3) 2, 3, 5, 9, 10, 13, 14, 15

Section 12 18

Section 12(a) 19

Section 12(a)(b) 16

Section 12(b) 17

Section 12(b)(6), 50 App. U. S. C. §462(b)(6) 18

Selective Service Regulations:

32 C. F. R. 1621.10 21

32 C. F. R. 1621.13 21

32 C. F. R. 1621.14 19

32 C. F. R. 1622.1(b) 19

PAGE

32 C. F. R. 1622.1(c) 17

32 C. F. R. 1622.5 3

32 C. F. R. 1622.10 17

32 C. F. R. 1622.25 12

32 C. F. R. 1623.2 17

32 C. F. R. 1624 17

32 C. F. R. 1625.1 17

32 C. F. R. 1625.1(c) 19

32 C. F. R. 1628.16 21

32 C. F. R. 1641.7 19

32 C. F. R. 1642 19

32 C. F. R. 1642.1 5

32 C. F. R. 1642.1(b) 17

32 C. F. R. 1642.6 5

32 C. F. R. 1642.4(a) 21

32 C. F. R. 1642.14(b) 20

32 C. F. R. 1642.15 5

Miscellaneous:

Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 (1960) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

TIMOTHY J. BREEN,

Petitioner,

—VS.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Timothy J. Breen prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 10, 1969.

Opinions Below

The opinion of the District Court is reported at 284 F. Supp. 749 and is set forth in the Appendix, *infra*, pp. 42-53. The opinion of the Court of Appeals is unreported. It is set forth in the Appendix, *infra*, pp. 27-41.

Jurisdiction

The judgment of the Court of Appeals was entered on January 10, 1969. The jurisdiction of this Court is conferred by 28 U. S. C. Sec. 1254(1).

Questions Presented

Petitioner, a duly enrolled, full-time undergraduate student, was deferred from training and service in the Armed Forces under Section 6(h)(1) of the Military Selective Service Act of 1967 [50 App. U. S. C. Sec. 456(h)(1)]. Upon returning his Selective Service Registration Certificate to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under the Selective Service Regulations, stripped of his deferment, reclassified I-A and ordered to report for induction. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U. S. C. Sec. 460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate in his personal possession, violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

3. Does Selective Service Regulation 1617.1 [32 C. F. R. Sec. 1617.1], as construed and applied in this case, and

Selection Service Regulation 1642.4 [32 C. F. R. Sec. 1642.4] on its face, violate the First Amendment?

Statutes and Regulations Involved

Sec. 10(b)(3), Military Selective Service Act of 1967; 50 App. U. S. C. Sec. 460(b)(3) is set out in the Appendix, *infra*, p. 54.

Sec. 6(h)(1), Military Selective Service Act of 1967; 50 App. U. S. C. Sec. 456(h)(1) is set out in the Appendix, *infra*, pp. 54-55.

Selective Service Regulation 1622.25; 32 C. F. R. Sec. 1622.25 is set out in the Appendix, *infra*, pp. 55-56.

Selective Service Regulation 1642.4; 32 C. F. R. Sec. 1642.4 is set out in the Appendix, *infra*, p. 57.

Statement of the Case[1]

At all times relevant hereto, petitioner was a duly enrolled full-time undergraduate student at the Berkeley School of Music in Boston, Massachusetts. As a then nineteen-year-old citizen, the petitioner was classified II-S by Local Board No. 16 of Bridgeport, Connecticut, as required by 50 App. U. S. C. Sec. 456(h)(1) [hereafter Sec. 6(h)(1)], and 32 C. F. R. Sec. 1622.25.

On November 16, 1967, together with numerous other persons registered under the Military Selective Service

[1] The statement of the case is based upon the allegations in the complaint, taken as admitted upon the Government's motion to dismiss. *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947).

Act of 1967, petitioner delivered his Registration Certificate (SSS Form 2) to a clergyman for return to the Government of the United States, solely for the purpose of registering his dissent from participation by the United States in the war in Vietnam.

Thereafter, petitioner received a Delinquency Notice (SSS Form 304) mailed on January 9, 1968, informing him that on January 8, 1968, he had been "declared delinquent" because of "Failure to have Registration Certificate in your possession."[2] Simultaneously, on January 9, 1968, petitioner was reclassified from II-S to I-A.

As noted in the majority opinion below, these actions by Local Board No. 16 "were in line with a memorandum and letter dated respectively October 24 and October 26, 1967, from the Director of Selective Service" (App., *infra*, p. 28). This memorandum and letter (set forth in the Appendix, *infra*, pp. 59-62) addressed to all local Selective Service Boards, advised local boards, among other things, to deny deferments to any registrant who takes part in "any action that violates the Military Selective Service Act." The declaration of petitioner as a delinquent and his reclassification to I-A by the respondent Local Board was clearly in implementation of General Hershey's instructions.[3] The letter from General Hershey directed local

---

[2] The Delinquency Notice is set out in the Appendix, *infra*, p. 58.

[3] In its brief in *Oestereich* v. *Selective Service Local Board No. 11*, 37 U.S.L. Week 4053, the government conceded that "It is difficult to conclude that these statements [by General Hershey] did not in effect invite local boards to utilize delinquency reclassification in a punitive fashion" (p. 52).

boards to act on the basis of information received concerning so-called "illegal" demonstrations involving registrants such as the petitioner, on the strength of which classifications were to be re-opened, the registrant classified anew, "and if evidence of violation of the Act and Regulations is established, also to declare the registrant to be a delinquent and to process him accordingly."

On January 11, 1968, Local Board No. 16 mailed petitioner an order to report on January 29, 1968 for a physical examination (SSS Form 223). This examination was subsequently postponed.

In February, 1968, petitioner appealed his reclassification to the Selective Service Appeals Board under the provisions of 32 C. F. R. Sec. 1642.15 (R. 2-3).

On February 20, 1968, petitioner filed suit in the United States District Court, District of Connecticut, seeking a judgment that the declaration of his delinquency and his reclassification were null and void, an injunction against his induction into the armed forces, and $20,000 damages. Petitioner sought further to have Sections 1642.1-1642.46 of the Selective Service Regulations declared unconstitutional on their face and as applied to petitioner, and to declare unconstitutional the letter and memorandum of General Lewis B. Hershey.

Respondents moved to dismiss the complaint on March 8, 1968, on the grounds of lack of jurisdiction, relying upon Sec. 10(b)(3). Respondents also moved that the temporary restraining order issued by the Court on March 1, 1968, be dissolved. After a hearing and oral argument on March 8, 1968, the District Court granted respondents' motion to dismiss, on the grounds that the Court was deprived of jurisdiction by Section 10(b)(3).

Subsequent to the decision of the District Court, petitioner's administrative appeal was unanimously denied and he was ordered to report for induction. In April of 1968, pursuant to an order of his Local Board, petitioner submitted to a pre-induction physical examination and was determined to be physically fit for military duty. His order for induction was stayed by the District Court pending decision of the appeal by the court below. A further stay was granted by the Court of Appeals at the time of oral argument until such time as the case was decided by that court.

On January 10, 1969, the orders and decision below were affirmed (Judge Feinberg dissenting). The essential rationale of the majority opinion was that *Oestereich* v. *Selective Service System Local Board No. 11*, 37 U. S. L. W. 4053 was distinguishable from the case at bar, in that the former involved a statutory *exemption* and the latter a statutory *deferment*. Contenting itself with the conclusion that the conflict between the statute and the regulations which arose in *Oestereich* "is therefore not present here", the court stressed the decision of this Court in *Clark* v. *Gabriel*, 37 U. S. L. W. 3217.[4]

---

[4] The Court's reasoning in *Clark* should be noted, where it held:

"In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.' 50 U. S. C. App. §456(g)."

On January 17, 1969, an application to stay the mandate, pending application for a writ of certiorari to the Supreme Court of the United States, was made to the Court of Appeals. The stay was granted and, on February 28, 1969, it was extended to and including March 10, 1969.

Reasons for Granting the Writ

Introduction

Certiorari should be granted in this case because it directly and immediately affects a substantial number of students within the Selective Service System, many of whom already have been reclassified from II-S to I-A, pursuant to the directives of General Hershey.

According to Selective Service statistics, the total number of registrants classified II-S was 1,807,060 on December 1, 1967 and 1,779,648 on December 1, 1968. It is self-evident that the grounds for reclassification of any such group of registrants, particularly in the highly sensitive First Amendment area, must be clearly defined by the courts. Such vast numbers of registrants are entitled to be able to predict the consequences of various kinds of acts and conduct, both private and public, in which they are likely to engage, whether on or off the campus.

According to statistics supplied by the Justice Department, 537 registrants were reclassified from II-S to Class I-A delinquent, during the twelve month period from December 1, 1967 to December 1, 1968 alone, purely as a result of having surrendered possession of their Selective

Service Cards.[5] All of these registrants, as well as additional numbers who have been similarly reclassified subsequent to December 1, 1968, will be directly affected by the determination of the issues in this case.

The large number of reclassifications during this brief period indicates the growing response by local boards throughout the country to the directives issued by General Hershey in October, 1967. These directives, and their implementation by local boards, have placed thousands of registrants in a position where the availability of pre-induction judicial review is of immediate significance.

In addition to the large number of registrants directly affected by the policy and procedures here at issue, no less significant is the number of registrants who have been silenced or inhibited out of fear that, should they engage in a similar or equivalent act of protest against the war in Vietnam or on other public issues, they too will lose their deferred status in spite of being full-time students. What is at stake, therefore, is the power of the government to place some 1,800,000 registrants in Class II-S in the position of surrendering their right to speak freely on questions of urgent public importance, or risk penalties and punishment for the free exercise of this right.

A. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich* v. *Selective Service Local Board No. 11*, 37 U. S. L. Week 4053.

In its decision in *Oestereich*, this Court characterized the use of the delinquency procedure in the circumstances

---

[5] Letter of February 14, 1969 from William D. Ruckelhaus, Assistant Attorney General, to Melvin L. Wulf, one of petitioner's attorneys.

of that case as "basically lawless" and a "clear departure" by the local Selective Service board from its mandate. It held that, if a board could withhold or withdraw an exemption from a registrant "for activities or conduct not material to the grant or withdrawal of the exemption" (i.e., the invocation of delinquency reclassification), it would have the effect of making local boards "free-wheeling agencies meting out their brand of justice in a vindictive manner". 37 U. S. L. Week at 4054.

The Court also noted that even if the Congress had authorized local boards to revoke Selective Service exemptions through the use of delinquency procedures, "serious questions would arise if Congress were silent and did not prescribe standards to govern the boards' actions." *Ibid.*

Oestereich stands for two propositions: First, that delinquency reclassification is unlawful if the registrant involved qualifies for a statutory exemption, and, second, that a bona-fide claim of such an unlawful reclassification is entitled to pre-induction judicial review despite the language of Section 10(b)(3). The underlying issue in the case at bar is whether this same reasoning and exception to Section 10(b)(3) applies to a registrant with a mandatory statutory deferment rather than a statutory exemption.

Petitioner's case is on all fours with the facts in *Oestereich*. Both involve full-time students enrolled as undergraduates in institutions of higher learning who took part in organized demonstrations in opposition to the war in Vietnam. Both cases involve an act of returning draft cards to the government. Neither involve either the destruction or mutilation of a draft card. Both registrants

were declared delinquent by their local boards pursuant to instructions contained in the Memorandum and letter which issued from the Director of Selective Service in October, 1967. Neither was given an opportunity for a hearing on the finding of delinquency, nor was either given the opportunity to clear up the delinquency. Both were reclassified I-A on the same day that they "became delinquent". The reason for the alleged delinquency in each instance was the failure to possess a Registration Certificate. Both were ordered to report forthwith for induction into the armed forces.

The teaching of *Oestereich* is clear: a student who is entitled by statute to an exemption from military service is entitled to judicial review of his reclassification, without having to make the harsh and risky choice of either defying induction and inviting criminal prosecution or submitting to induction and thereafter seeking judicial relief through habeas corpus. In *Oestereich,* this Court specifically relieved the registrant of that dilemma so as not to constitute Sec. 10(b)(3) "with unnecessary harshness." *Supra,* at 4054.

The argument that *Oestereich* involved an exemption for divinity students, whereas petitioner's case involves a deferment for undergraduates, and that therefore the two cases are distinguishable, is insubstantial.

The fact is that the deferment which is granted to undergraduate students under the Military Selective Service Act of 1967 is no less mandatory than the exemption for divinity students which is laid down in the same statute. Thus, Section 6(h)(1) provides in pertinent part:

> "Except as otherwise provided in this paragraph, the President *shall* under such rules and regulations as

> he may prescribe, *provide for the deferment* from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. *A deferment* granted to any person under authority of the preceding sentence *shall continue* until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. . . . " (Emphasis added.)

Here, as in *Oestereich,* Congress has declared as a national policy that persons such as petitioner who are "satisfactorily pursuing a full-time course of instruction at a college" shall be deferred until they reach the age of twenty-four, or obtain a baccalaureate degree or fail to pursue a full-time course of instruction "satisfactorily", whichever first occurs.

The statute goes even further, and may be construed as even stronger than the pertinent statutory provision in *Oestereich,* for it declares that such student deferments are not to be "substantially restricted or terminated" unless the President specifically finds that "the needs of the Armed Forces require such action". As Judge Feinberg correctly emphasized in his dissenting opinion below:

> "This is about as clear a statement of congressional intent as you can get, made all the more emphatic by its appearance in the Selective Service Act for the first time in the 1967 amendments" (App., *infra*, p. 37).

It is also to be noted that the 1967 Act changed the provisions of Sec. 6(h)(1) so as to make such student deferments mandatory, using the term "shall", in place of the prior discretionary language authorizing the President to provide for such deferment as was "found to be necessary to the maintenance of the national health, safety, or interest . . . ". Prior to the 1967 amendments, the implementing regulations (32 C. F. R. §1622.25) left the deferment of individual students to the discretion of the local board.

The majority opinion below attempts to circumvent the clear statutory command of Section 6(h)(1) by placing heavy emphasis on the phrase "under such rules and regulations as he [the President] may prescribe . . . " (App., *infra*, pp. 30-31). This ignores the introductory phrase of Sec. 6(h)(1) which governs it, namely, "Except as otherwise provided in this paragraph . . . " This controlling language requires that a student deferment "*shall* continue" until and unless one of several specified events take place, none of which have anything to do with an alleged delinquency for failure to possess one's draft card.

The word "delinquents" in Section 6(h)(1) is so obviously irrelevant to all of the provisions of that statute that it hardly merits attention. But the majority opinion, in distinguishing *Oestereich*, rests upon the fleeting reference to that word in a definition of the phrase "prime age group". However, to paraphrase the language of this

Court in *Oestereich,* the statutory deferment is "plain and unequivocal . . . and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type." 37 U. S. L. Week at 4054-4055.

In light of the foregoing, it is not surprising that the dissenting opinion by Mr. Justice Stewart in *Oestereich,* which Justices Brennan and White joined, concedes that, to the extent that Section 10(b)(3) is no bar to judicial review in a case involving a statutory "exemption", it is equally so in the case of a statutory "deferment" which "may just as 'plainly' preclude a registrant's induction." 37 U. S. L. Week at 4058, note 9. At least one lower court has already decided that the distinction which the Government claims between the exemption provisions of Section 6(g) and the deferment provisions under Section 6(h) "is one without legal significance". *Kimball* v. *Selective Service Local Bd. No. 15,* 283 F. Supp. 606, 608 (S. D. N. Y. 1968). See also *Armendariz* v. *Hershey,* 37 U. S. L. Week 2461 (D. W. Tex., Feb. 5, 1969) (1-S deferment).

B. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face and as applied.

In his concurring opinion in *Oestereich,* Mr. Justice Harlan emphasized the importance of the validity of pre-induction judicial review where the governing statutes and regulations are attacked as facially unconstitutional. Petitioner's posture here is identical to that of *Oestereich* for it is his claim "that the very statutes or regulations which

the board administers are facially invalid", and therefore Section 10(b)(3) which has specific reference to "classification or processing" does not apply. 37 U. S. L. Week at 4055. The case at bar does not involve what Mr. Justice Harlan correctly characterized as "the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service board must make prior to issuing an order to report for induction." *Ibid.*

Thus, the courts below were not asked to review factual or discretionary decisions inherent in the "classification or processing" of a registrant, which the statute is intended to prevent. Rather, they were asked to determine the constitutionality of an administrative procedure which was actually "beyond the competence of the Selective Service Boards to hear and determine". 37 U. S. L. Week at 4056. It is clear that the constitutionality of a federal statute is beyond the jurisdiction of administrative agencies. *Public Utilities Commission* v. *United States*, 355 U. S. 534, 539 (1958). This is especially true of local draft boards, given their composition.

A lower court has already applied these principles to a I-S registrant who was reclassified pursuant to another Hershey Memorandum which was incompatible with Sec. 6(h)(2). On the authority of *Oestereich* the court concluded that it was "beyond cavil that a statutory right cannot be taken away by Administrative fiat" and that the plaintiff's I-S request involved "only legal determinations by the board" which were therefore subject to judicial review. *Armendariz* v. *Hershey*, 37 U. S. L. Week 2462.

Any other reading of Sec. 10(b)(3), as Mr. Justice Harlan's concurring opinion in *Oestereich* makes clear, is incompatible with its constitutionality:

ion review in this case would,

"To withhold pre- of his liberty without the prior thus, deprive petit to any competent forum— opportunity to substantial claim that he was agency or court- ant to an unlawful procedure. ordered inducted of §10(b)(3) would raise seri- Such an interpre lems, and is not indicated by ous constitutiona nguage, or purpose." 37 U. S. the statute's hist L. Week at 4056

ion that the action of respon- It is petitioner's c orth in the following sections, dents, for the reason ns invalid on their face or as were based upon reg , Section 10(b)(3) cannot con- applied and that, the reclude pre-induction judicial stitutionally be held review.

C. Certiorari should b ed to decide whether the punitive reclassification of p er violates the due process clause of the Fifth Amen and the Sixth Amendment.

Kennedy v. *Mend rtinez,* 372 U. S. 144 (1963), spells out the criteria used to measure whether administrative sanction o be denominated penal or regulatory.

"The punitive of the sanction here is evident under the tests tionally applied to determine whether an Act gress is penal or regulatory in character, even t in other cases this problem has been extremely ult and elusive of solution. Whether the san volves an affirmative disability or restraint, whe has historically been regarded as a punishment, er it comes into play only on a finding of scient ther its operation will promote

> the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ." 372 U. S. at 168-169.

Of the *Mendoza-Martinez* criteria, at least four clearly apply here.

(1) Induction "involves an affirmative disability or restraint." This could hardly be gainsaid, in light of the well-recognized facts of military life. Indeed, the availability of *habeas corpus* to secure release from the armed forces, *Eagle* v. *United States ex rel. Samuels,* 329 U. S. 304 (1946), necessarily rests upon such an hypothesis.

(2) Induction premised upon delinquency "comes into play only on a finding of *scienter.*" The Act makes it an offense to "knowingly" fail or neglect to perform a required duty. Sec. 12(a)(b). This Court has imposed the same criminal *mens rea* requirements upon liability for delinquency status, reclassification, and induction consequent thereon. *Bartchy* v. *United States,* 319 U. S. 484 (1943).

(3) Punitive reclassification followed by induction is designed to "promote the traditional aims of punishment—retribution and deterrence." The delinquency notice (SSS Form 304) resolves any doubt on this score, for it informs the delinquent registrant that unless he brings himself into conformity with his duties under the Act and Regulations, he will be subject to reclassification to Class I-A or

to prosecution. One is at a loss to imagine any functions other than deterrence and retribution which might be served by taking a registrant out of a classification in which he otherwise belongs—like IV-D (ministerial), IV-F (unfit for service), II-S (student), or III-A (dependency) —and reclassifying him for immediate induction into the armed forces.

(4) "[T]he behavior to which [punitive reclassification and induction] applies is already a crime," under Section 12(b) of the Act.

If the Court should hold that petitioner's induction is punishment, it would then be obliged to decide whether the punishment was imposed with due process of law. We believe the Court could not but conclude that due process is entirely absent from the procedures leading to petitioner's induction.

The procedures denied include the following: counsel [Reg. 1642.1(b)]; confrontation and cross-examination [see *Harris* v. *Ross*, 146 F. 2d 355 (5th Cir. 1944)]; compulsory process [Reg. 1642.1(b)]; privilege against self-incrimination [Regs. 1622.1(c), 1622.10, 1623.2, 1625.1]; burden of proof [Regs. 1622.1(c), 1622.10]; an impartial tribunal; public trial [Regs. Part 1624]; jury trial.

As the Court observed in *Mendoza-Martinez*, "If the sanctions these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." 372 U. S. at 167.[6]

---

[6] In its brief in *Oestereich*, the government conceded that:

"If the essential purpose actually underlying delinquency reclassification is to punish registrants for their failure to comply

D. Certiorari should be granted to decide whether the punitive use of delinquency and reclassification procedures, as in this case, is authorized by statute or regulation.

The Military Selective Service Act of 1967 declares that service in the armed forces is an obligation and privilege. Section 1(c), 50 App. U. S. C. Sec. 451(c). This view of service is also reflected in Section 6(m) of the Act which allows, if it does not encourage, exclusion from service of those convicted of offenses punishable by imprisonment for a term exceeding one year.

Nonetheless, respondents here have presumed to invoke the delinquency and reclassification procedures against petitioner because he violated Reg. 1617.1 which requires registrants to have their registration certificates in their personal possession, a requirement enforceable under the Act's penal provision. Section 12(b)(6), 50 App. U. S. C. Sec. 462(b)(6). Thus, the circumstances here are the same as in *Wolff* v. *Selective Service,* 372 F. 2d 817 (2nd Cir. 1967), where the Second Circuit held that the draft boards "exceeded their jurisdiction" when they undertook to declare registrants delinquent on the ground that they violated the Act's penal provisions. 372 F. 2d at 820. " . . . [N]o regulation authorizes a draft board to declare a registrant a delinquent or to reclassify him for such action." *Id.* at 821.

As *Wolff* points out, however, jurisdiction of some offenses under Section 12 is shared by the District Courts

---

with their duties under the Selective Service law and regulations, a serious constitutional question is raised, since none of the required constitutional safeguards traditionally associated with criminal punishment are provided" (p. 49).

and the local boards. The decision refers explicitly to that portion of Section 12(a) which makes it a crime for any person knowingly to "fail or neglect or refuse to perform any duty required of him under or in execution of this title." Thus, as the Second Circuit said, "a parallel clause of the regulations provides that if a registrant fails to produce certain requested information or to appear for questioning, he may under 32 C. F. R. §1642.4(a) be declared a delinquent and classified or reclassified I-A." 372 F. 2d at 821.

The question here, therefore, is whether the possession requirement of Reg. 1617.1 is the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification. We believe it is not.

The principal responsibility of local boards is to select young men for induction into the armed forces. "Classification is the key to selection . . . ", Reg. 1622.1(b), and the key to classification is "pertinent" information. Reg. 1622.1 (b). The regulations empower the boards to secure this information in a wide variety of ways. See Regs. 1621.14, 1622.1(b), 1625.1(c), 1641.7.

Information being the key to classification, the local board must have some device by which to secure that information from uninformative registrants. That device is the delinquency procedure. Regs. Part 1642.

Delinquency, properly viewed, is analogous to civil contempt. It is designed not to punish for past acts, but to coerce compliance with the procedures of the system leading up to classification. Delinquency status says to the registrant: until you bring yourself into compliance with the rules designed to enable your local board to ensure that

you are properly classified, you will be treated as having waived all the benefits of the System's procedures, and therefore as available for immediate induction.

The delinquency regulations explicitly provide for the expunging of delinquency—indeed, they relax the ordinary rule that a reopening of classification cannot be had after an order to report for induction, thereby allowing the registrant to conform to the requirements of Selective Service procedure right up to the last moment. Reg. 1642.14(b). The registrant is not bound by his waiver of the System's procedural rights until he is actually in the armed forces. Up until the very last moment he can, by cooperating with the procedures which enable his local board to make appropriate classification decisions, receive consideration of his claim that he should not be considered available for immediate induction. *Ibid.* The "Delinquency Notice" itself requests the registrant to contact his local board at once—obviously with an eye to clearing up the alleged default.

Possession by a registrant of his registration certificate plainly has nothing to do with the ability of a local board to perform its classification function. In no way is the board's consideration of the propriety of a registrant's current classification (or a classification he claims), or its ability to maintain official contact with him, impeded or affected by whether or not he happens to possess the required document.

It follows from the fact that the possession requirement is not an integral part of the relationship between a local board and its registrants, that to use reclassification as a sanction to enforce the requirement is to use it as punish-

ment—not as mere "civil" enforcement of the rules of the classification procedure.

Acts unrelated to the classification process itself may be crimes under the Act. As such, they may well be punishable —after a fair trial, before an impartial judicial tribunal, with all of the required procedural safeguards and rights. They may not, under the Regulations, the Act, or the Constitution, be punished in summary proceedings appropriate only for "civil" enforcement of the rules of the classification process.

E. Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague and overbroad.

Reg. 1642.4(a) authorizes declarations of delinquency (and consequent I-A classification and priority induction) of a registrant who "has failed to perform any duty or duties required of him under the selective service law. . . ." As construed by the government in this and other cases, the regulation can be and has been applied to punish a registrant for exercising First Amendment rights.

An examination of the regulations demonstrates that the delinquency provisions are designed to serve the discrete purpose of securing information needed for intelligent classification (see Sec. D, *supra*). Consequently, the "duties required" under Reg. 1642.4(a) are properly limited to such things, for example, as the duty to return the Classification Questionnaire within 10 days (Reg. 1621.10), the duty to correct an inadequate Questionnaire (Reg. 1621.13), and the duty to report for physical examination (Reg. 1628.16). But as we have seen, the regulation has in fact been construed to include not only the alleged "duty" by

petitioner to possess his registration certificate, but also the kind of "duty" said to have been owed by the appellants in *Wolff* v. *Selective Service, supra.* According to General Hershey, it could, and should, be construed also to include the "duty" not to violate the Act in its entirety, as well as its "related processes", and not to perform acts "under unfortunate influences of misdirected emotions . . . or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation. . . ." App., *infra,* p. 60.

A statute or regulation which lends itself to such broad interpretation runs afoul not only of the general rule against vague statutes, see, e.g., *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961); Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. Law Rev. 67 (1960), but also the rule in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), which condemns statutes with an "overbroad sweep . . . [which] lend themselves too readily to denial of [First Amendment] rights." 380 U. S. at 486.

In *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508 (1964), this Court said, "It is a familiar and basic principle . . . that 'a governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" And the Court repeated the admonition set out in *NAACP* v. *Button,* 371 U. S. 415 (1963): "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 378 U. S. at 516.

The way in which Reg. 1642.4 has been applied, brings it squarely within the doctrine which forbids overbroad legislation which invades rights protected by the First Amendment. The National Director of Selective Service having actively and publicly encouraged local boards to impose the sanctions on "misguided registrants", surely his interpretation of the regulation has had the effect of "discouraging protected activities," *Dombrowski* v. *Pfister, supra* at 490, and "chilling . . . protected expression". *Id.* at 494. Reg. 1642.4 should be struck down in its entirety because to deal with "only a narrow portion of the prohibition at any one time" will not contribute "materially to articulation of the statutory standard." *Id.* at 491.

F. Certiorari should be granted to decide whether petitioner's surrender of his Registration Certificate was an act of speech protected by the First Amendment.

Petitioner alleged in his pleadings below, and has consistently maintained, that the surrender of his Selective Service Registration Certificate in order to protest the Vietnam war was a symbolic act of speech directed to a major public issue. As such, it was within the protection of the First Amendment guarantee of free speech. Since neither the destruction nor mutilation of the Certificate is involved, the facts of this case are distinguishable from those in *United States* v. *O'Brien*, 391 U. S. 367 (1968).

A consistent line of First Amendment cases has established the doctrine that symbolic action may often be protected speech under the First Amendment. Thus, "freedom of speech" has been held applicable to a whole gamut of cases, running from the display of a red flag in *Stromberg* v. *California*, 283 U. S. 359 (1931), to refusal to salute the American flag in *West Virginia State Board of Education*

v. *Barnette,* 319 U. S. 624 (1943), to picketing by labor unions in *Thornhill* v. *Alabama,* 319 U. S. 88 (1940), to wearing black arm-bands in school in protest against the war in Vietnam in *Tinker, et al.* v. *Des Moines Independent Community School District,* 37 U. S. L. W. 4121.

Symbolic conduct such as the turning over of a draft card to a clergyman should be considered speech or expression within the protection of the First Amendment because it is peaceful in its content and directly relevant to the issue giving rise to the protest. Thus, in *Tinker,* the Court emphasized that petitioners were being punished for a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" on their part. 37 U. S. L. Week at 4122. Obviously, not all speech and expression is protected under the Constitution, particularly where "nonspeech" elements are involved. See *United States* v. *O'Brien, supra.* The courts have confronted, for more than a century, the need for balancing the necessity for an ordered society against the equally vital constitutional requirement that the freedoms of speech and assembly must be protected for that society to be democratic. This "delicate balance" has perenially required resort to such criteria as reasonableness, relevancy, and peacefulness, in weighing whether or not the action in question is constitutionally protected. But only the most "compelling" and "paramount" considerations have been held to justify infringement upon First Amendment freedoms where their exercise is *both* peaceful *and* relevant, as was surely the case with petitioner's action in turning over his draft card to a clergyman. See, for example, *NAACP* v. *Button, supra; Thomas* v. *Collins,* 323 U. S. 516 (1945); and *Sherbert* v. *Verner,* 374 U. S. 398 (1963).

This Court has repeatedly recognized that conduct which is aimed at changing government policy by appealing to the government should be protected. It is only in this way that we insure that the government will be responsive to the will of the people. In *Stromberg* v. *California, supra* at 369, this Court held:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Thus, this Court has repeatedly recognized the importance of First Amendment rights as they relate to the democratic process. Equal sensitivity has been demonstrated in numerous decisions to the fragility of these constitutional rights, particularly when their exercise involves issues of critical current national importance.

The Court has shown its concern not only with direct attempts to infringe upon such rights, but with all statutes, regulations, ordinances and the like which have an indirect but potentially limiting effect upon the exercise of First Amendment rights. Thus, statutory schemes which are found to impose restraints upon the freedoms of speech and assembly, or which merely are found to have a "chilling effect" upon their exercise, have been held to violate the Constitution. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). It is in this tradition that the Court, ever since *Thomas* v. *Collins, supra,* has allowed "the widest room for discussion, the narrowest room for its restriction . . .". At 530.

The danger to the "transcendent value" of freedom of expression is clearly manifest in the present case. Some of the vital questions associated with the war in Vietnam have been and continue to be the effect of the war on our defense posture, our economy, our foreign relations, and our urban problems, to mention only a few. Symbolic protests such as peaceful marches, peaceful vigils, and the peaceful transmission of draft cards either directly to Washington or through the intermediary of a clergyman, have been among the most widely used methods for ventilating such issues and raising these questions before the government and the public alike.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

EMANUEL MARGOLIS
25 Bank Street
Stamford, Connecticut

LAWRENCE P. WEISMAN
955 Main Street
Bridgeport, Connecticut

MELVIN L. WULF
156 Fifth Avenue
New York, New York

Attorneys for Petitioner

March 10, 1969

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 47—September Term, 1968.

(Argued September 17, 1968 Decided January 10, 1969.)

Docket No. 32345

TIMOTHY J. BREEN,

Plaintiff-Appellant,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Defendants-Appellees.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal by a Selective Service registrant, who had held a student deferment and was reclassified I-A because of delinquency for failing to have a registration certificate in his possession, from an order of the District Court for Connecticut, William H. Timbers, *Chief Judge,* dismissing for want of jurisdiction a complaint seeking to enjoin his induction. Affirmed.

EMANUEL MARGOLIS, Stamford, Conn. (Lawrence P. Weisman, Bridgeport, Conn.), *for Appellant.*

JON O. NEWMAN, United States Attorney, Hartford, Conn., *for Appellees.*

FRIENDLY, *Circuit Judge*:

Plaintiff Breen, a 20-year old resident of Connecticut, is a registrant under the Selective Service System. He had held a II-S (student) deferment, 50 U. S. C. App. §456 (h)(1), 32 C. F. R. §1622.25, because of being an undergraduate at the Berkeley School of Music in Boston. In mid-November, 1967, he delivered his Selective Service Registration Certificate to a clergyman in Boston for the purpose of protesting United States involvement in the war in Vietnam. On January 9, 1968, his Local Board mailed him a notice, 32 C. F. R. §1642.4(b), that he had been declared a delinquent for failure to have the Certificate in his possession as required by 32 C. F. R. §1617.1. At the same time the Local Board reclassified him from Class II-S to Class I-A because of his delinquency, pursuant to 32 C. F. R. §1642.12, which authorizes such reclassification "regardless of other circumstances." These actions of the Board were in line with a memorandum and a letter dated respectively October 24 and 26, 1967, from the Director of Selective Service. The Local Board ordered Breen to report for a physical examination on January 29 but subsequently postponed this. Apparently Breen did not seek a personal appearance under 32 C. F. R. §1642.14. However, he appealed his reclassification under that same section.

In February 1968 Breen brought this action in the District Court for Connecticut, seeking a judgment that the

declaration of his d
null and void, an i
armed forces, and
was predicated on
the first could affo
dismiss the compl
court convoked. B
jurisdiction by §8(
81 Stat. 104, whic
Service Act, 50 U.
provision set forth
a considered opinio
denied Breen's.

ncy and his reclassification were
n against his induction into the
damages. Although jurisdiction
. C. §§1331, 1343 and 2201, only
sis.[1] The Government moved to
d Breen to have a three-judge
that the court was deprived of
e Military Service Act of 1967,
ded §10(b)(3) of the Selective
pp. §460(b)(3), by including the
nargin,[2] Chief Judge Timbers, in

After the decisio
trative appeal was
induction, but the
tion of this appeal
tember, we deferre
had set for early
No. 46, October T
plicability and vali
though in a somew

ted the Government's motion and
district court, Breen's adminis-
and he was ordered to report for
as stayed pending the determina-
the appeal reached us in Sep-
ion because the Supreme Court
nt *Oestereich* v. *United States*,
68, which also involved the ap-
the amendment to §10(b)(3) al-
rent context.

We now have t
Oestereich, —— U
the amendment in

efit of the Court's decisions in
— (1968), 37 L. W. 4053, holding
le to a claim by an exempt theo-

1 Plaintiff sough
by a conclusory s
value of $10,000
Board No. 12, 37
made no point a

the requirement of jurisdictional amount that the matter in controversy exceeds the of interest and costs. See *Wolff* v. *Local* 7, 826 (2 Cir. 1967). The Government has nor shall we.

2 No judicial re
of any registran
except as a defe
12 of this title,
or negatively to

be made of the classification or processing boards, appeal boards, or the President, riminal prosecution instituted under section registrant has responded either affirmatively o report for induction . . . .

logical student that the delinquency regulations could not be applied to him, and in *Clark* v. *Gabriel*, —— U. S. —— (1968), 37 L. W. 3217, holding the amendment valid and applicable to the rejection of a claim of conscientious objection. While neither decision reads precisely on the issue here tendered, applying their teaching as best we can, we affirm the judgment of the district court.

Oestereich, a student at a theological school preparing for the ministry, who had been declared delinquent for having turned in his registration certificate, was entitled under §6(g) to an exemption from military service and not merely to a deferment of his obligation. The element critical to the holding that the amendment to §10(b)(3) was inapplicable in his case was the Court's view that:

> Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption.

Since the Board's action in depriving a divinity student of the exemption which was his "statutory right" was therefore "blatantly lawless" and "involved a clear departure by the Board from its statutory mandate," to read the statute as forcing Oestereich to choose between induction and a criminal prosecution before he could vindicate his rights would be "to construe the Act with unnecessary harshness."

In contrast, §6(h)(1) of the Selective Service Act, 50 U. S. C. App. §456(h)(1), dealing with the deferment of undergraduates, on which Breen relies, directs:

> Except as otherwise provided in this paragraph, the President shall, *under such rules and regulations as*

> *he may prescribe,* provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. (Emphasis supplied.)

While 32 C. F. R. §1622.25 provides for the placing of undergraduates in Class II-S, §1642.12, promulgated by the President on July 4, 1967, Ex. Order No. 11360, 32 F. R. 9794, authorizes their removal from that classification on a declaration of delinquency. Arguments that this provision offends the "Except as otherwise provided" language with which §6(h)(1) begins or that the "rules and regulations" must be relevant to the deferment (e.g., the obtaining of certain grades), collide with the fact that in the last sentence of §6(h)(1)[3] Congress expressly recognized the long-standing provision for reclassification and early induction of delinquents with respect to student deferments. This is clear evidence that Congress did not suppose that reclassification pursuant to the delinquency regulations would violate the provision of §6(h)(1) that

> Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action.

The conflict between statute and regulations that arose in *Oestereich* is therefore not present here.

---

3 The congressional committee reports on the extensive amendments to the Selective Service Act in 1967 explicitly take note of the existence of the delinquency regulations. S. Rep. No. 209, 90th Cong., 1st Sess. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess. 17.

We consequently find no sufficient justification in this case for denying to the words of the 1967 amendment to §10 (b)(3), see fn. 2, the meaning which they so plainly have and which the Committee reports, set forth in the dissenting opinion in *Oestereich,* —— U. S. at ——, show they were intended to have. As recognized in Mr. Justice Harlan's concurring opinion in *Oestereich,* —— U. S. at ——, fn. 7, "Section 10(b)(3) was likely precipitated by the Second Circuit's well publicized decision in Wolff v. Selective Service Local Board No. 16, 372 F. 2d 817 (1967)." See, to the same effect, the dissenting opinion of Mr. Justice Stewart, joined by Justices Brennan and White, —— U. S. at —— & fn. 5. If Congress meant to withhold the preinduction review we had granted in *Wolff* to students enjoying deferments who had been declared delinquent for acts not within the regulations, it surely must have intended to do this where, as here, there has been an undisputed violation of 32 C. F. R. §1617.1 requiring continued possession of a certificate—a requirement which the Supreme Court has characterized as serving "a legitimate and substantial purpose in the system's administration." *United States* v. *O'Brien,* 391 U. S. 367, 378 (1968). As said by Mr. Justice Douglas, the author of *Oestereich,* in his concurring opinion in *Clark* v. *Gabriel, supra,* —— U. S. at ——, "it takes the extreme case where the Board can be said to flout the law, as it did in Oestereich v. Selective Service, ante, p. ——, to give preinduction review of its actions."

The argument that the Board "flouts the law" so as to require preinduction review of its actions whenever its proceedings are claimed to violate the Constitution, although these were consistent with the Selective Service Act, was rejected *sub silentio* in *Gabriel.* Although the opinion in that case did not specifically refer to any constitutional

issues raised, the Government's Jurisdictional Statement shows that Gabriel asserted violations of First and Fifth Amendment rights, and also apparently claimed that the Selective Service system involves unconstitutional delegations of the legislative, executive, and judicial powers. The Court could readily have passed only on such of Gabriel's points as did not require inquiry into the findings of fact or exercise of discretion of the individual Board. Instead, acting under §10(b)(3), it refused to consider any of Gabriel's claims, saying

> We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction.

We do not intimate that Breen's claims that his reclassification because of the return of his certificate violated his First Amendment rights to protest, as to which see *United States* v. *O'Brien, supra,* and his Fifth Amendment rights to adequate standards and notice, are not substantial. We hold only that they must be asserted in the ways to which Congress plainly limited him, to wit, refusal to submit to induction or post-induction habeas corpus.

It remains only to add that the decision that a three-judge court was not required was correct. Breen did not seek an injunction "restraining the enforcement, operation or execution" of §10(b)(3), 28 U. S. C. §2282; rather the Government raised that statute as a bar. See *Int'l Ladies Garment Workers Union* v. *Donnelly,* 304 U. S. 243, 251

(1938); *Flemming* v. *Nestor*, 363 U. S. 603 (1960); *Petersen* v. *Clark*, 285 F. Supp. 698 (N. D. Calif. 1968).

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

I respectfully dissent.

The underlying issue in plaintiff's action is whether the Selective Service delinquency procedure, as applied to a registrant who is delinquent because he protests national policy, is proper. It is now clear that such delinquency reclassification is not lawful if the registrant so treated happens to qualify for a statutory exemption. In *Oestereich* v. *Selective Service System Local Board No. 11*, 37 U. S. L. W. 4053 (U. S. Dec. 16, 1968), five members of the Supreme Court characterized use of the delinquency procedure in that situation as "basically lawless," making the local draft boards "free-wheeling agencies meting out their brand of justice in a vindictive manner."[1] A sixth member

---

1 We can find no authorization for that use of delinquency. Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Solicitor General confesses error on the use by Selective Service of delinquency proceedings for that purpose.

We deal with conduct of a local Board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board

of the Court, Mr. Justice Harlan, concurred in the holding that the delinquency reclassification in that case was improper and characterized as "nonfrivolous" the arguments made there that the entire procedure was unconstitutional "punishment." *Id.* at 4056 n. 6. Therefore, there can be no doubt that the basic question that plaintiff seeks to raise—whether he was ordered inducted by an illegal procedure—is substantial, even though he has not yet been able to convince a court that it should decide the issue.

The precise question before us is whether plaintiff is now entitled to such a judicial forum without making the harsh and risky choice of defying induction (and inviting criminal prosecution) or of submitting to induction and attempting to obtain habeas corpus. In *Oestereich*, the Court construed section 10(b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. §460(b)(3), to relieve the registrant of that dilemma; in *Clark* v. *Gabriel*, 37 U. S. L. W. 3217 (U. S. Dec. 16, 1968), it did not. As an inferior federal court, we must attempt to follow the teaching of these cases, as my brothers point out. However, doing so leads me to a contrary result.

---

member might be better served. See *Townsend* v. *Zimmerman*, 237 F. 2d 376. In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. As the Solicitor General suggests, such literalness does violence to the clear mandate of §6(g) governing the exemption. Our construction leaves §10(b)(3) unimpaired in the normal operations of the Act. [37 U. S. L. W. at 4054.]

It is true that *Oestereich* involved an *exemption* for divinity students, which the local board "blatantly" disregarded, while here plaintiff relies on a *deferment* for undergraduates. But that deferment is quite plain in the statute; section 6(h)(1) of the Military Selective Service Act of 1967, 50 U. S. C. App. §456(h)(1), provides:

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under

> the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Thus, Congress has explicitly made it national policy to provide deferments for "persons satisfactorily pursuing a full-time course of instruction at a college," which continue until the student reaches the age of 24 or obtains his degree, unless his studies are unsatisfactory. Moreover, such deferments are not to be "substantially restricted or terminated" unless the President finds "that the needs of the Armed Forces require such action." This is about as clear a statement of congressional intent as you can get, made all the more emphatic by its appearance in the Selective Service Act for the first time in the 1967 amendments.[2]

---

2 See Davis & Dolbeare, Selective Service: Present Impact and Future Prospects, 1967 Wis. L. Rev. 892, 909; Note, Changes in the Draft: The Military Selective Service Act of 1967, 4 Colum. J. L. & Soc. Prob. 120, 136-37 (1968). Prior to 1967, the President was authorized —not required—to provide for such deferment of students as was "found to be necessary to the maintenance of the national health, safety, or interest," former 50 U. S. C. App. §456(h); by regulation the deferment of individual students was left to the discretion of the local board, see former 32 C. F. R. §1622.25.

I cannot satisfactorily distinguish this case from *Oestereich*. Each involves a clear statutory grant by Congress to a specified class of registrants of the right not to be inducted into military service, although in this case the right is referred to as a deferment rather than an exemption. The Court's observations in *Oestereich* are therefore equally apt here:

> Since the exemption granted divinity students is plain and unequivocal and in no way contested here, and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type. [Footnote omitted.]

37 U. S. L. W. at 4054-55. Indeed, the applicability of the reasoning of *Oestereich* to the situation here was clearly foreseen by the three dissenting Justices in that case.[3]

In reaching a contrary view, my brothers rely on that portion of section 6(h)(1) which qualifies the statutory command for student deferments as subject to "such rules and regulations as [the President] may prescribe." But

---

3 The dissenters wrote, 37 U. S. L. W. at 4058 n. 9:

> The Court seems to limit its holding to statutory "exemptions"; yet "deferments" may just as "plainly" preclude a registrant's induction. See, *e.g.*, 50 App. U. S. C. §456(h)(1) (Supp. III, 1968); 32 CFR §1622.25 (1968) (full-time college students).
>
> Cf. *Kimball* v. *Selective Serv. Local Bd. No. 15*, 283 F. Supp. 606, 608 (S. D. N. Y. 1968) (enjoining induction of plaintiff): "It is submitted that the distinction attempted to be drawn by the Government between an 'exemption' under §456(g) and a 'deferment' under §456(h) is one without legal significance." A notice of appeal from a similar subsequent order involving a different plaintiff in the same case has been filed in this court. No. MR 2219, 2d Cir., Aug. 13, 1968.

that clause is itself qualified by the introductory phrase in the first sentence, "Except as otherwise provided in this paragraph." The paragraph does, as already noted, otherwise provide both that student deferments shall continue until the occurrence of specified events and also that such deferments shall not be "substantially restricted" by the President unless he finds that "the needs of the Armed Forces" require it.[4] The former limitation is not relied on by the Government. As to the latter, I see no such finding in Executive Order No. 11360, 32 Fed. Reg. 9787, 9794 (1967), relied on by the majority. Moreover, it would seem that authority to promulgate "rules and regulations" would extend only to those which would sensibly be relevant to the deferment, e.g., the obtaining of certain grades, referred to by the majority, the furnishing of proof of bona fide undergraduate status, or the definition of a "full-time" student. My brothers also rely on the fleeting reference in the last sentence of section 6(h)(1) to "delinquents," which does not deserve the significance attributed to it. The Selective Service System made a similar argument in *Oestereich* without success. Finally, the fact that the requirement of continued possession of a registration certificate serves a legitimate purpose is beside the point. The underlying issue is whether the proper agency to "punish" transgressions of that rule is a court, under traditional safeguards, or an unfettered draft board, consisting of "part-time uncompensated members," in a proceeding essentially "nonjudicial." 37 U. S. L. W. at 4056 (Harlan, *J.*).

The foregoing analysis of *Oestereich* and its effect on this case is strengthened by close examination of the Court's

---

4 See Note, Changes in the Draft: The Military Selective Service Act of 1967, 4 Colum. J. L. & Soc. Prob. 120, 140 n. 158 (1968).

decision on the same day in *Clark* v. *Gabriel, supra.*[5] In that case, the registrant's draft board rejected his claim to classification as a conscientious objector; the Court held that section 10(b)(3) prevented review until after induction or criminal prosecution. The Court in *Gabriel* distinguished *Oestereich* as follows, 37 U. S. L. W. at 3217:

> In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being "sustained by the local board." . . .
>
> Here the board has exercised its statutory discretion to pass on a particular request for classification, "evaluating evidence and . . . determining whether a claimed exemption is deserved." Oestereich v. Selective Service System Local Board No. 11, ante, p. ——. A local board must make such a decision in respect of each of the many classification claims presented to it. To allow pre-induction judicial review of such determinations would be to permit precisely the kind of "litigious interruptions of procedures to provide

---

5 This was a *per curiam* opinion by four members of the Court. Mr. Justice Douglas filed a separate concurrence, the dissenters in *Oestereich* concurred for the reasons they expressed in that case, and Mr. Justice Black thought that probable jurisdiction should be noted and the case set down for argument.

necessary military manpower" . . . which Congress sought to prevent when it enacted §10(b), (3).

The differences between this case and *Gabriel* are clear. In *Gabriel,* the registrant's right to his classification depended "upon an act of judgment by the board." No such discretionary decision is involved here. Section 6(h)(1) contains no similar condition that a registrant's claim for student deferment be "sustained by the local board"; in any event, there is no doubt that Breen was a full-time student at a college. Therefore, whether the registrant in *Gabriel* raised constitutional issues, as the majority states, is not crucial. What is more significant is that in *Gabriel,* unlike both this case and *Oestereich,* the action of the draft board "inescapably involves a determination of fact and an exercise of judgment."

In short, I believe this case is governed by the reasoning in *Oestereich.* If the registrant there was entitled before induction to a judicial hearing on his claims, he should get no less here.[6] Accordingly, I would remand to the District Court for Connecticut for that purpose.

---

6 It should be noted that the same result would be reached if the approach of Mr. Justice Harlan in *Oestereich* were adopted. Plaintiff here, like the plaintiff in *Oestereich,* contends "that the procedure employed by the board is invalid on its face." 37 U. S. L. W. at 4055. Similarly, such a claim

> does not invite the court to review the factual and discretionary decisions inherent in the "classification or processing" of registrants, and does not, therefore, present opportunity for protracted delay. . . . [I]t presents an issue beyond the competence of the Selective Service boards to hear and determine.

Id. at 4055-56.

Memorandum of Decision on Plaintiff's Motions for a Preliminary Injunction and for the Convening of a Three-Judge District Court and on Defendant's Motion to Dismiss

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 12,422

TIMOTHY J. BREEN,

Plaintiff,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Defendants.

Appearances:

LAWRENCE P. WEISMAN, of Cohen & Wolf, Bridgeport, Conn., and Emanuel Margolis, Stamford, Conn., for plaintiff.

JON O. NEWMAN, U. S. Atty., Hartford, Conn., for defendants.

In this action brought to challenge defendants' right to induct plaintiff into the armed forces, plaintiff has moved for a preliminary injunction to restrain defendants from continuing to process him for induction. Defendants op-

pose this motion and have moved for dismissal of the complaint on the ground that jurisdiction is lacking in this Court. Because the Court agrees that plaintiff's complaint fails to state a cause of action over which the Court has jurisdiction, plaintiff's motion for a preliminary injunction is denied and the complaint is dismissed. Plaintiff's motion for the convening of a three-judge district court to consider the issues here presented is also denied.

On November 16, 1967, plaintiff delivered his draft card to a clergyman in Boston, Massachusetts, for return to the government. Allegedly the sole purpose of this act was to protest United States' involvement in the war in Vietnam.

The Military Selective Service Act of 1967, 50 App. U.S.C. §451 et seq., authorizes the President of the United States to prescribe necessary rules and regulations to carry out its provisions. 50 App. U.S.C. §460(b)(1). Pursuant to this authorization, Sections 1617.1 and 1623.5 of the Selective Service regulations (32 C.F.R. §§1617.1 and 1623.5 (1967)) require a person registered and classified by the selective service to have at all times in his personal possession his Registration Certificate and a valid Notice of Classification. Both items are commonly referred to as draft cards. In addition, §1602.4 of the regulations (32 C.F.R. §1602.4 (1967)) defines a "delinquent" as "a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law." Sections 1642.1-1642.46 (32 C.F.R. §§1642.1-1642.46 (1967)) govern the treatment of delinquents. In relevant part they provide that a person failing to perform any duty required under the law may be declared a delinquent by the Board. (32 C.F.R. §1642.4(a) (1967)). When this is done the Board

must send a Delinquency Notice to the registrant setting forth the duty which the registrant has failed to perform. (32 C.F.R. §1642.4(b) (1967)). Once having declared a registrant delinquent the Board may proceed to reclassify the registrant into Class I-A (32 C.F.R. §1642.12 (1967)), and having done so, the Board must order him to report for induction before all others, even before volunteers (32 C.F.R. §§1642.13 and 1631.7 (1967)).

On January 9, 1968, plaintiff's Draftboard, located in Bridgeport, Connecticut, mailed him a Delinquency Notice, informing him that on January 8, 1968, he had been "declared delinquent" because of "Failure to have Registration Certificate in your possession." Also on January 9, 1968, plaintiff was reclassified from Class II-S (student deferment) to Class I-A. On January 11, 1968 he was ordered to report for a pre-induction physical, but at his request, the examination was transferred to Boston, Massachusetts and postponed until March 4, 1968.

Plaintiff filed the original complaint in this action on February 20, 1968. On March 1, 1968, plaintiff filed a substituted complaint and the instant motion for a preliminary injunction. Plaintiff also sought and obtained at that time an ex parte temporary restraining order.

A hearing was held on March 8, 1968 on plaintiff's motion for a preliminary injunction. Also filed and heard at that time was plaintiff's motion for the convening of a three-judge district court pursuant to 28 U.S.C. §2282 to consider the request for a preliminary injunction and for the extension of the temporary restraining order until the three-judge district court could act. In addition, defendants' counsel filed, and the Court heard, a motion to dismiss the complaint for lack of jurisdiction.

At the conclusion of the hearing the Court dissolved the temporary restraining order but otherwise reserved decision on the pending motions.

Plaintiff's complaint avers that the draftboard was without jurisdiction to declare plaintiff a delinquent and to reclassify him, and that its conduct in so doing was unconstitutional. The Board's actions, plaintiff claims, were meant as a penalty and will have the effect of inhibiting the exercise of First Amendment rights by himself and others. Plaintiff also attacks the regulations described above as being unconstitutional on their face and as applied, claiming that they violate the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Plaintiff further claims that his reclassification into Class I-A simultaneously with the mailing to him of notice that he was "delinquent" and prior to his receipt of that notice violated Selective Service regulations and due process of law. Finally, plaintiff contends that his reclassification resulted from an improper "directive" concerning reclassification sent by the Director of the Selective Service System, Lt. Gen. Lewis B. Hershey, to draftboards on October 26, 1967.

Plaintiff asks the Court in his complaint to declare that the designation of plaintiff as delinquent and his reclassification are null and void; to enjoin defendants from taking further steps to induct or reclassify him on the basis of his turning in his draft card; to declare the Selective Service regulations referred to above unconstitutional on their face and as applied; and to declare the Hershey "directive" void on its face and as applied. Plaintiff also demands $20,000 in damages.

The threshold question raised by plaintiff's complaint and motion for a preliminary injunction and brought into

focus by defendants' motion to dismiss is whether plaintiff states a cause of action over which this Court has jurisdiction.

Plaintiff claims jurisdiction pursuant to 28 U.S.C. §§1331, 1343 and 2201, and asserts that the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States including 42 U.S.C. §§1981 and 1983.

It is clear that 28 U.S.C. §2201 does not confer jurisdiction but merely creates a remedy where jurisdiction otherwise exists. *Skelly Oil* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

Nor is 28 U.S.C. §1343 of any help to plaintiff. Subsections (1) and (2) of that provision only confer jurisdiction in instances where damages are sought with respect to violations of 42 U.S.C. §1985; plaintiff does not allege, nor could he properly allege, a violation of that section. Subsection (3) applies only where a state law, statute, ordinance, regulation, custom or usage is involved; none of these is involved here. Subsection (4) confers jurisdiction where relief is sought under an Act of Congress providing for the protection of civil rights. The only such laws relied upon by plaintiff, 42 U.S.C. §§1981 and 1983, require state action; no state action is alleged here. See *Oestereich* v. *Selective Service System Local Bd. No. 11*, —— F.Supp. —— (D. Wyo. Feb. 6, 1968), *aff'd*, —— F.2d —— (10 Cir. Feb. 21, 1968).

Nevertheless, this action does arise under the Constitution and laws of the United States and as such 28 U.S.C. §1331 would generally confer jurisdiction if the matter in controversy exceeded the sum or value of $10,000, ex-

clusive of interest and costs. Although plaintiff alleges that the action involves the requisite jurisdictional amount and seeks to recover $20,000 in damages, a very real question exists whether the necessary amount is in fact in controversy. See *Wolff* v. *Selective Service Local Bd. No. 16*, 372 F.2d 817, 826 (2 Cir. 1967). *Cf. Oestereich* v. *Selective Service System Local Bd. No. 11, supra.*

But assuming the requisite jurisdictional amount has been sufficiently demonstrated, the Court is convinced that §8(c) of the Military Selective Service Act of 1967, amending Section 10(b)(3) of the Universal Military Training and Service Act (50 App. U.S.C. §460(b)(3)), specifically deprives this Court of whatever jurisdiction it might otherwise have over this action.

Prior to its amendment in June, 1967, Section 10(b)(3) provided that decisions of local draftboards with respect to classifications "shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." The United States Supreme Court in *Estep* v. *United States*, 327 U.S. 114, 122-23 (1946) interpreted this to mean that:

> ". . . Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the Courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Having thus defined the narrow scope of judicial review, the Court proceeded to interpret Congressional intent as to when that review could take place. After *Falbo* v. *United States,* 320 U.S. 549 (1944), it appeared that a registrant could not even defend a criminal prosecution under the Act on the ground that his Board's classification action was without jurisdiction; rather, review could come only by way of habeas corpus after his actual induction. But in *Estep* the Court held that where all administrative remedies had been exhausted, the defense could be raised in a criminal prosecution for the simple reason that Congress could not have intended to require "the Courts to march up the hill when it is apparent from the beginning that they will have to march down again." *Id.* at 125. The court, however, was careful to point out that it was only this practical reason which resulted in its conclusion, stating that:

> "We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive." *Id.*

Implicit in the Court's reasoning is that Congress, in the context of the Selective Service System, can constitutionally limit judicial review of administrative action to a point in time subsequent to the institution of criminal proceedings or actual induction of the registrant. This principle was again recognized by the court in *Witmer* v. *United States,* 348 U.S. 375, 377 (1955).

Several courts, however, without questioning Congressional power to provide otherwise, have held that Section

10(b)(3) did not deprive them of jurisdiction to review classification prior to the exhaustion of administrative remedies and the institution of criminal proceedings.

Most notable of these cases was *Wolff* v. *Selective Service Local Bd. No. 16, supra,* a decision by the Court of Appeals for this Circuit. The plaintiff in that case was attempting to challenge his delinquency status and reclassification which resulted from his participation in demonstrations against United States involvement in Vietnam. Judge Medina, having found that Section 10(b)(3) did not deprive the court of jurisdiction, then held that the facts of the case warranted the court's setting aside its own doctrines of justiciability and exhaustion of administrative remedies.

Of particular relevancy was the court's finding that the Board's action was completely without authority of any regulation and as such constituted a "chilling effect" upon the exercise of "fragile and sensitive" constitutional rights within the purview of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). *Id.* at 824. The facts of the instant case are, of course, quite different from those in *Wolff.* Here the Board's actions were entirely by virtue of regulations. The existence of a standard permits the registrant to know exactly what conduct will result in Board action and as such, the far-reaching "chilling effect" feared by the court in *Wolff* is non-existent. Thus even if the first premise of *Wolff,* that Section 10(b)(3) did not deprive this Court of jurisdiction, were still valid, the Court would feel compelled in this instance to decline to intervene until plaintiff had completely exhausted his administrative remedies.

But that first premise of *Wolff* does not have the force of authority which it would otherwise have for this Court

in view of Congressional action taken since that decision. That action was the amendment of Section 10(b)(3) in June, 1967 by Section 8(c) of the Military Selective Service Act of 1967 so as to read as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." 50 App. U.S.C. §460 (b)(3)

Whatever doubt there was as to Congressional intent concerning the former Section 10(b)(3) has thus now been eliminated.

Plaintiff argues that Congress merely intended to codify such cases as *Wolff*. That just the opposite is true is plainly expressed by the report of the Armed Services Committee of the House of Representatives with respect to the amendment:

> "The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review

until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System." H. Rep. No. 267, 90th Cong. 1st Sess., 7 U.S. Cong. News 1489 (1967)

It is therefore clear that because plaintiff has not exhausted his administrative remedies and has not yet been ordered to report for induction, this Court lacks jurisdiction to entertain plaintiff's complaint. *Oestereich* v. *Selective Service System Local Bd. No. 11, supra; Carpenter* v. *Hendrix,* —— F.Supp. —— (N.D. Ga. Nov. 14, 1967) (36 U.S. Law Week 2349); *Moskowitz* v. *Kindt,* 273 F.Supp. 646 (E.D. Pa. 1967).

In view of *Estep* v. *United States, supra,* and *Witmer* v. *United States, supra,* plaintiff's claim that Congress cannot constitutionally force a registrant to await criminal proceedings or actual induction to test the validity of his classification is without merit. Whether the amendment intends to preclude the use of habeas corpus and, if so, whether it would therefore be unconstitutional, is not in issue here as plaintiff has not yet been inducted into the armed services and is not bringing this action upon a petition for a writ of habeas corpus. *Moskowitz* v. *Kindt, supra,* at 648-49.

Plaintiff has moved for the convening of a three-judge district court pursuant to 28 U.S.C. §2282 and contends that a single judge is without power even to dismiss the complaint for lack of jurisdiction. First, assuming there were federal court jurisdiction, 28 U.S.C. §2282 requires the convening of a three-judge district court only when a complaint seeks an injunction against the enforcement of an Act of Congress and not when the injunction is sought against the enforcement of regulations promulgated pursuant to a general authorization contained therein. *Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106, 113-116 (2 Cir. 1966). Secondly, it is not only within the power of, but it is incumbent upon, the single judge to whom the application is made to determine whether there is any basis for federal jurisdiction. *Cf. Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962). If in the course of making that determination, the construction and constitutionality of a federal statute is drawn into question, as plaintiff attempted to do here with respect to Section 8(c) of the Military Selective Service Act of 1967, the Court is not required by 28 U.S.C. §2282 to halt its determination and convene a three-judge district court to consider the matter. Not only must the complaint on its face raise a substantial question as to the constitutionality of a federal statute but it must also seek an injunction against its enforcement, neither of which is done by plaintiff's complaint with respect to Section 8(c) of the Military Selective Service Act of 1967. See, *Flemming* v. *Nestor,* 363 U.S. 603, 606-08 (1960). Therefore, plaintiff's motion for the convening of a three-judge district court must be denied.

Order

ORDERED that:

(1) Plaintiff's motion for a preliminary injunction is denied.

(2) Plaintiff's motion for the convening of a three-judge district court is denied.

(3) Plaintiff's complaint is dismissed for lack of subject matter jurisdiction, but without costs.

Dated at New Haven, Connecticut, this 13th day of March, 1968.

WILLIAM H. TIMBERS
William H. Timbers
Chief Judge

Statutes and Regulations Involved

50 App. U.S.C. Sec. 460(b)(3):

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

50 App. U.S.C. Sec. 456(h)(1):

> "Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the

President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers."

32 C.F.R. Sec. 1622.25:

Class II-S: Registrant deferred because of activity in study.

(a) In Class II-S shall be placed any registrant who has requested such deferment and who is satisfac-

torily pursuing a full-time course of instruction at a college, university, or similar institution of learning, such deferment to continue until such registrant completes the requirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first.

(b) In determining eligibility for deferment in Class II-S, a student's "academic year" shall include the 12-month period following the beginning of his course of study.

(c) A student shall be deemed to be "satisfactorily pursuing a full-time course of instruction" when, during his academic year, he has earned, as a minimum, credits toward his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the proportion which the number of academic years completed bears to the normal number of years established by the school to obtain such degree. For example, a student pursuing a four-year course should have earned 25% of the credits required for his baccalaureate degree at the end of his first academic year, 50% at the end of his second academic year, and 75% at the end of his third academic year.

(d) It shall be the registrant's duty to provide the local board each year with evidence that he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

32 C.F.R. Sec. 1642.4:

Declaration of delinquency status and removal therefrom.

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

SELECTIVE SERVICE SYSTEM

Appeal Not Request

DELINQUENCY NOTICE

APPENDIX D

Jan. 8, 1968
(Date Declared Delinquent)

Jan. 9, 1968
(Date of Mailing)

[illegible] 15
[illegible]
Bridgeport, [illegible]
(Local Board Stamp)

SELECTIVE SERVICE NO.
6 16 43 116

To Timothy John Breen
(First) (Middle) (Last)

Address 31 Gorham Avenue
(Street and Number or RFD Route)

Westport, Fairfield, Conn.
(City, Town, or Village) (County) (State) (ZIP Code)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law.

FAILURE TO HAVE REGISTRATION CERTIFICATE IN YOUR POSSESSION.

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000 or by both such fine and imprisonment. You may be classified in class 1-A as a delinquent and ordered to report for induction.

A. C. Wallace
(Member or Clerk of Local Board)

INSTRUCTIONS

A Delinquency Notice (SSS Form 304) shall be prepared by the Local Board whenever it declares the registrant to be a delinquent because of his failure to perform any duty or duties required of him other than failure to comply with an Order to Report for Induction (SSS Form 252), or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153). This notice shall be prepared in triplicate and the specific duty or duties which the registrant has failed to perform shall be described in detail in the space provided. The Local Board shall: (a) mail the original to the registrant at his last known address; (b) file a copy in the registrants Cover Sheet (SSS Form 21) and (c) mail a copy to the State Director of Selective Service.

SSS Form 304 (5-25-65)

U.S. GOVERNMENT PRINTING OFFICE

916-215

[New York Times, Thursday, November 9, 1967]

Texts of Letter and Memo on the Draft

Special to The New York Times

Washington, *Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum dated Oct. 24, from General Hershey on draft cards:*

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specfied age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military of naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should

include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greatest possible extent consistent with sound procedure.

MEMORANDUM

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state

director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 29 1969
JOHN F. DAVIS, CLERK

Office-Supreme Court, U.S.
FILED
MAR 29 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. ~~1114~~, 1175, ~~1176~~ 65 70 71

TIMOTHY J. BREEN,

Petitioner,

—v.—

SELECTIVE SERVICE LOCAL BOARD NO. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System of Connecticut,

Respondents.

ROLF J. KOLDEN,

Petitioner,

—v.—

SELECTIVE SERVICE LOCAL BOARD NO. 4, Beltrami County, Minnesota,

Respondent.

DAVID EARL GUTKNECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR CERTIORARI

EMANUEL MARGOLIS
25 Bank St.
Stamford, Conn.

LAWRENCE P. WEISMAN
955 Main St.
Bridgeport, Conn.

MELVIN L. WULF
156 Fifth Ave.
New York, N. Y.

Attorneys for Petitioner Timothy J. Breen

MELVIN L. WULF
156 Fifth Ave.
New York, N. Y.

CHESTER BRUVOLD
625—2nd Ave. S.
Minneapolis, Minn.

JOSEPH PERRY
Commerce Bldg.
St. Paul, Minn.

LYNN CASTNER
925 Upper Midwest Bldg.
Minneapolis, Minn.

Attorneys for Petitioner Rolf J. Kolden

MELVIN L. WULF
156 Fifth Ave.
New York, N. Y.

CHESTER BRUVOLD
625—2nd Ave. S.
Minneapolis, Minn.

Attorneys for Petitioner David Earl Gutknecht

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 1114, 1175, 1176

TIMOTHY J. BREEN,

Petitioner,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System of Connecticut,

Respondents.

ROLF J. KOLDEN,

Petitioner,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 4, Beltrami County, Minnesota,

Respondent.

DAVID EARL GUTKNECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR CERTIORARI

Petitioners file this Supplemental Brief pursuant to Rule 24(5), Rules of the Supreme Court, to call attention to intervening matter not available at time of their last filing.

Each of the three petitioners at bar has raised the question, among others, whether the application of the Selective Service delinquency regulations in their cases was a form of punishment. If so, petitioners claim that, pursuant to *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963), the punishment could not be imposed without observance of essential procedural due process requirements.

If there were any doubt that the application of the delinquency procedures was for purposes of punishment, that doubt is resolved by the correspondence set out in the Appendix, *infra.*

The February 3, 1969 letter from Captain Kenneth S. Goodrich, Chief, Manpower Division, Selective Service System, makes it perfectly clear that the Selective Service System treats the delinquency procedure as the precise equivalent of punishment and the precise alternative to prosecution. Speaking of the consequences of this Court's decision in *Oestereich* v. *Selective Service,* Captain Goodrich suggests to the Oklahoma State Director of Selective Service that registrants whose IV-D exemptions have been withdrawn should be reclassified IV-D, but that their delinquency status need not be removed. He goes on to say:

> "Following reclassification of these registrants, if they are retained in a delinquency status, they should then be reported to the United States Attorney for prosecution for failure to have in their possession their selective service cards.

In the event that the United States Attorney, in each of these cases, declines to prosecute, the registrants should be continued in a delinquent status. At such time as they no longer qualify for a IV-D classification, they may at that time be reclassified into Class I-A, unless they qualify for Class I-O, and ordered to report for induction as delinquents, provided they are still within the age of liability. If they qualify for Class I-O, they should be ordered to perform civilian work in lieu of induction."

Nothing could be more plain, therefore, that the Selective Service System treats the delinquency procedure as a means to punish registrants for alleged violations of the Military Selective Service Act or the Selective Service Regulations.

Respectfully submitted,

ANUEL MARGOLIS
25 Bank St.
Stamford, Conn.

WRENCE P. WEISMAN
955 Main St.
Bridgeport, Conn.

LVIN L. WULF
156 Fifth Ave.
New York, N. Y.

torneys for Petitioner
Timothy J. Breen

MELVIN L. WULF
156 Fifth Ave.
New York, N. Y.

CHESTER BRUVOLD
625—2nd Ave. S.
Minneapolis, Minn.

JOSEPH PERRY
Commerce Bldg.
St. Paul, Minn.

LYNN CASTNER
925 Upper Midwest Bldg.
Minneapolis, Minn.

Attorneys for Petitioner
Rolf J. Kolden

MELVIN L. WULF
156 Fifth Ave.
New York, N. Y.

CHESTER BRUVOLD
625—2nd Ave. S.
Minneapolis, Minn.

Attorneys for Petitioner
David Earl Gutknecht

March 29, 1969

APPENDIX

APPENDIX

(Letterhead—National Headquarters, Selective Service System, Washington, D. C. 20435)

Feb. 28, 1969

Mr. Richard K. Snyder
TYLER, COOPER, GRANT, BOWERMAN & KEEFE
Counsellors at Law
Post Office Box 1936
New Haven, Connecticut 06509

Subject: HICKS, William Scott
SS No. 34-76-42-814
STROUP, George W., III
SS No. 34-76-44-651

Dear Mr. Snyder:

This is to acknowledge receipt of your letter dated February 4, 1969, regarding the cases of the above-named registrants.

You state in your letter that repeated attempts to ascertain the status of these cases have been unavailing. You further request our response to five questions relating to the processing of these cases.

Since we do not have the files of these two registrants at this Headquarters, we are unable to furnish the information requested by you. Under section 1606.32 of the Selective Service Regulations (32 C.F.R. 1606.32), the registrant or anyone having written authority from him may examine his file at any time during which the local board is open for the regular conduct of business.

Processing in the cases of these registrants had been temporarily suspended pending the decision of the Supreme Court in the Oestereich case. Following the decision of the Court in that case, we have, upon request, furnished to the respective State Directors our suggestions for further processing in cases of this type. We enclose herewith for your information a copy of our letter to the Oklahoma State Director respecting the cases of these two registrants which, we believe, you will find to be self-explanatory.

For The Director,

/s/ Roy R. Bartlett
Lt. Colonel, JAGC
Assistant General Counsel

Enclosure

COPY

3 February 1969

State Director of Selective Service
810 Leonhardt Building
Oklahoma City, Oklahoma

Subject: William Scott Hicks
SS No. 34-76-42-814

George W. Stroup
SS No. 34-76-44-651
Your Files: 400-2

Dear Colonel Hope:

Attached are the selective service files of the subject registrants that were received with your letters of 21 November 1968.

The local board should advise the registrants that their classifications are going to be reopened. Each registrant should be requested to complete a Current Information Questionnaire (SSS Form 127) and to submit current information from his theological or divinity school and his church or religious organization reflecting his entitlement to a ministerial exemption. When such information is submitted, the registrants should be reclassified according to all of the information contained in their files. It is recommended that the delinquency not be removed. Section 1642.4(a) of the Selective Service Regulations does not require the reclassification of a registrant upon his being declared to be a delinquent. If the local board classifies them in Class IV-D, they should be notified that their

delinquencies have not been removed, if such is the decision of the local board.

Following reclassification of these registrants, if they are retained in a delinquency status, they should then be reported to the United States Attorney for prosecution for failure to have in their possession their selective service cards.

In the event that the United States Attorney, in each of these cases, declines to prosecute, the registrants should be continued in a delinquent status. At such time as they no longer qualify for a IV-D classification, they may at that time be reclassified into Class I-A, unless they qualify for Class I-O, and ordered to report for induction as delinquents, provided they are still within the age of liability. If they qualify for Class I-O, they should be ordered to perform civilian work in lieu of induction.

For the Director,

KENNETH S. GOODRICH
Captain USNR
Chief, Manpower Division

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1144

TIMOTHY J. BREEN, PETITIONER

v.

SELECTIVE SERVICE LOCAL BOARD NO. 16, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 42–53) is reported at 284 F. Supp. 749. The opinions of the court of appeals (Pet. 27–41) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1969. The petition for a writ of certiorari was filed on March 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)(3))

347-116—69

prohibits pre-induction judicial review of a I–A delinquency reclassification of a registrant eligible for a II–S deferment as an undergraduate student.

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460(b)(3)) provides, in pertinent part:

* * * * *

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of 50 U.S.C. App.], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 6(h)(1) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 456(h)(1)) provides:

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of

learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term

"prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

32 C.F.R. 1642.4 provides:

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and

shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

STATEMENT

On January 8, 1968, petitioner, an undergraduate student at the Berklee School of Music in Boston, Massachusetts, with a Selective Service classification of II–S, was declared to be a delinquent for failing to have his Registration Certificate in his personal possession [1] as required by 32 C.F.R. 1617.1 (Pet. 58). On January 9, 1968, he was reclassified I–A by his local board, pursuant to 32 C.F.R. 1642.12 (Pet. 28).[2]

In February 1968, petitioner brought this pre-induction suit to overturn his I–A classification and enjoin his induction into the Armed Forces (Pet. 28–29). The district court dismissed the complaint for lack of jurisdiction by virtue of Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460(b)(3)), which prohibits judicial review "of the classification or processing of any registrant" until after the registrant "has responded

[1] In November 1967 he delivered his certificate to a Boston clergyman in protest against the war in Vietnam (Pet. 28).

[2] 32 C.F.R. 1602.4 defines "delinquent" as a "person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law." 32 C.F.R. 1642.4(a) provides that [w]henever a registrant has failed to perform any duty or duties required of him under the selective service law * * * the local board may declare him to be a delinquent." "Selective service law" is defined to include "title I of the Military Selective Service Act of 1967 [50 U.S.C. App. 451 *et seq.*] and all the rules and regulations issued thereunder " (32 C.F.R. 1602.10).

either affirmatively or negatively" to an induction order (see *supra*, p. 2). The court of appeals, relying on this Court's decisions in *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233, and *Clark* v. *Gabriel*, 393 U.S. 256, affirmed the district court's dismissal of petitioner's suit, with one judge dissenting.

ARGUMENT

In seeking certiorari, petitioner relies mainly on the contention that the decision below conflicts squarely with this Court's decision in *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233. There is, however, no such conflict. Indeed, the court below correctly applied *Oestereich*, and its holding is supported by this Court's earlier disposition of the precise issue here involved. *Schiffman* v. *Selective Service Board No. 5*, 391 U.S. 930. Accordingly, there is no warrant for further review.

1. The decision below is not in conflict with the *Oestereich* holding that Section 10(b)(3) of the Military Selective Service Act of 1967, which bars pre-induction judicial review of a local board's I-A classification, does not apply to a ministerial student concededly eligible for an unqualified IV-D exemption from military service under Section 6(g) of the Act. Petitioner never held such an unqualified *exemption*. To the contrary, he enjoyed a II-S student *deferment* granted not under Section 6(g), but under Section 6(h) of the Act.

The distinction just noted takes on special importance because deferments granted under Section 6(h),

as emphasized by the court below, *are* expressly subjected to "such rules and regulations as [the President] may prescribe," including, of course, the delinquency regulations under which petitioner was reclassified from II–S to I–A (Pet. 30). A IV–D exemption from service under Section 6(g), on the other hand, is unqualified, unlimited and *not* made subject by the statute to such rules and regulations. For that reason, Oestereich's reclassification from IV–D to I–A under the delinquency regulations presented a direct clash between the Board's action and the absolute mandate of Section 6(g). That clash was there resolved by this Court's holding that Congress did not, in enacting Section 10(b)(3), intend to preclude pre-induction review of such action by a local board. However, there is no such collision in the instant case, because a Section 6(h) deferment is expressly made subject to the delinquency regulations.

This same distinction, adopted by the court below, was before this Court previously when it considered an earlier attempt, in *Schiffman* v. *Selective Service Board No. 5*, 391 U.S. 930, to analogize a Section 6(h) deferment (there a II–A occupational deferment) to the situation involved in *Oestereich*. This Court's refusal—soon after it granted certiorari in *Oestereich*—to consider or compel pre-induction judicial review in *Schiffman* is additional recognition of the validity of the distinction between a Secton 6(h) *deferment* and a Section 6(g) unqualified *exemption*, insofar as the

availability of pre-induction judicial review is concerned. See also *Boyd* v. *Clark,* 393 U.S. 316. And, as recently as March 10, 1969, in *Kaplysh* v. *Hershey, et al.,* and *Schwartz* v. *Local Board No. 23,* No. 1637 Misc., this Term, the Court denied stays sought to afford registrants claiming deferments pre-induction judicial review. In effect, therefore, the Court again recognized that the *Oestereich* exception to Section 10(b)(3)'s bar against such review applies only to registrants whose explicit statutory exemption has been revoked. Such a situation, the Court concluded in *Oestereich,* would involve "a clear departure by the Board from its statutory mandate" (393 U.S. at 238). Where deferments granted under the less absolute language of Section 6(h) are involved, however, no such departure is presented.

Thus, there is no conflict between *Oestereich* and the decision below. Nor is there any conflict between that decision and the decision of any other court of appeals. To the contrary, all the other courts of appeals which have considered the issue—the Fourth, the Sixth, and the Eighth Circuits—have recently reached the same result and have concluded that the *Oestereich* exception does not allow pre-induction judicial review to a registrant who challenges his reclassification from a deferred—as distinguished from exempt—status to I–A under the delinquency regulations. *Kraus* v. *Selective Service System Local 25,* No. 12,786 (C.A. 4), decided March 13, 1969; *Anderson* v. *Hershey,* No.

18976 (C.A. 6), decided April 11, 1969; *Kolden* v. *Selective Service Local Board No. 4,* No. 19,331 (C.A. 8), decided January 28, 1969, pending on petition for a writ of certiorari, No. 1175, this Term. See also *Wills* v. *United States,* 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908.

2. All of petitioner's other arguments, including those of a constitutional nature, were before this Court in *Oestereich* and in the companion case decided along with it—*Clark* v. *Gabriel,* 393 U.S. 256. At that time, as noted in the opinion below, the constitutional claims there asserted were "rejected *sub silentio* in *Gabriel*" (Pet. 32). And this Court's opinion in *Gabriel* rejects the argument that Section 10(b)(3)'s bar against pre-induction judicial review is unconstitutional. See also *Boyd* v. *Clark,* 393 U.S. 316. Since these contentions have been so recently considered by the Court, at least where presented in the context of a pre-induction suit,[3] they do not support the granting of the petition in the instant case and do not appear to call for extended comment here.

[3] It should be noted that the instant case and those like it are in a different posture, insofar as the claim of punitive reclassification is involved, than cases like *Gutknecht* v. *United States,* No. 1176, this Term, presently pending on petition for a writ of certiorari. Unlike *Gutknecht,* a criminal prosecution, the instant case involves an effort to obtain pre-induction judicial review in the face of Section 10(b)(3), as amended in 1967. It is only if the Court goes beyond the threshold jurisdictional issue here, as it did in *Oestereich,* that petitioner's contentions in this regard are reached.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
MORTON HOLLANDER,
RALPH A. FINE,
Attorneys.

APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statutes and Regulations Involved	2
Questions Presented	2
Statement of the Case	3
Summary of Argument	5
Argument	7
I.	
Section 10(b)(3) of the Military Selective Service Act of 1967 Does Not Bar Judicial Review of the Delinquency Declaration and Reclassification of Petitioner	7
A. Oesterich v. Selective Service Board, 393 U.S. 233 (1968) Is Controlling and Requires Preinduction Relief by Way of Mandamus or Injunction	7
1. Oesterich Requires Review Because a Statutory Right Is at Stake	7
2. There Is No Meaningful Distinction Between "Exemptions" and "Deferments"	16
3. Early Judicial Review Should Be Available to Test Any Alleged Board Violation of a Clear Legal Duty Owed the Registrant	21
B. Section 10(b)(3) Is Unconstitutional. If Not, the Constitutional Issues It Tenders Require That It Be Read Narrowly	32
1. The Basis in Fact Test	34
2. The Timing of Review	37

II. Page

The Selective Service Delinquency Regulations, 32 C.F.R. Part 1642, Are Invalid on Their Face and as Applied to Deny Petitioner His Statutory II-S Classification 38

1. The Application of Oestereich 38

2. The System's Failure to Provide Petitioner Notice Before Terminating His Deferment Makes Its Action Invalid 40

Conclusion 44

Appendix A. Statutes and Regulations Involved ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Ableman v. Booth, 62 U.S. 506	33
Atkins v. United States, 204 F. 2d 269, cert. denied, 346 U.S. 818	42
Bantam Books v. Sullivan, 372 U.S. 58	25
Bowen v. Hershey, 37 U.S.L.W. 2581	31
Boswell v. United States, 390 F. 2d 181	25
Carey v. Local Bd. No. 2, 297 F. Supp. 252	31
Chapman v. California, 386 U.S. 18	37
Clark v. Gabriel, 393 U.S. 256	2, 6, 10, 11, 19, 21, 26, 27, 31, 32, 39
Clark v. Uebersee Finanz-Korporation, 332 U.S. 480	3
Cox v. United States, 332 U.S. 442	34
Dickinson v. United States, 346 U.S. 389	9, 30, 34
Dombrowski v. Pfister, 380 U.S. 459	27, 38
Estep v. United States, 327 U.S. 114	10, 20, 26, 27, 29, 30, 31, 32, 36
Fabiani, Ex parte, 105 F. Supp. 139	9, 27
Falbo v. United States, 320 U.S. 549	19, 29, 31
Feldman v. Local Bd. No. 22, 239 F. Supp. 102	30
Foley v. Hershey, 409 F. 2d 827	31
Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222	40
Griffin v. Illinois, 351 U.S. 12	36
Hirsh v. Adair, 113 F. Supp. 116	30
Jones v. Cunningham, 371 U.S. 236	28
Kelly v. Wyman, 294 F. Supp. 893 sub. nom. Goldberg v. Kelly, 37 U.S.L.W. 3399	43

Page

Leary v. United States, ... U.S. ..... (1969) 35

Leedom v. Kyne, 358 U.S. 184 .....22, 23, 38, 39

Lynch v. Hershey, 208 F. 2d 523 30

Marbury v. Madison, 5 U.S. (1 Cranch) 137 .....33, 34

McKart v. United States, ... U.S. ..... (1969) 23, 24, 25, 29

Muhammad Ali v. Connally, 266 F. Supp. 345 30

Nat'l Students Ass'n v. Hershey, ... F. 2d .... (D.C. Cir. 1969) 16, 21, 23

Oestereich v. Selective Service Bd., 393 U.S. 233 .....2, 5, 6, 7, 8, 9, 10, 13, 15, 16, 18 .....19, 20, 21, 22, 23, 25, 26, 28, 31, 36, 38, 39

Pennsylvania Turnpike Comm'n v. McGinnis, 179 F. Supp. 578 33

Permutt v. Armstrong, 112 F. Supp. 247 30

Petersen v. Clark, 285 F. Supp. 700 10

Peterson v. Clark, 289 F. Supp. 949 37

Reap v. James, 232 F. 2d 507 30

Rumsa v. United States, 212 F. 2d 927 30

Schwartz v. Strauss, 206 F. 2d 767, aff'g 114 F. Supp. 439 .....21, 30

Shelley v. Kraemer, 334 U.S. 1 37

Sicurella v. United States, 348 U.S. 385 24

Simmons v. United Sates, 348 U.S. 397 .....24, 25, 43

Smith v. United States, 157 F. 2d 176, cert. denied, 329 U.S. 776 42

Sorenson v. Selective Service Bd. No. 107, 203 F. Supp. 786 .....30, 31

Tamarkin v. Selective Service Bd. No. 47, 243 F. 2d 108 30

Page

Thompson v. Louisville, 362 U.S. 199 36

Tomlinson v. Hershey, 95 F. Supp. 72 27

Townsend v. Zimmerman, 237 F. 2d 376 .....27, 28

United States v. Gainey, 380 U.S. 63 35

United States v. Klein, 80 U.S. (13 Wall.) 128 .....33, 34, 36

United States v. Lybrand, 279 F. Supp. 74 26

United States v. Seeger, 380 U.S. 163 .....32, 38

United States v. Washington, 392 F. 2d 37 34

Vitarelli v. Seaton, 359 U.S. 535 27

Watkins v. Rupert, 224 F. 2d 47 30

Westerbeke v. Local Draft Board No. 2, 118 F. Supp. 441 30

Wills v. United States, 384 F. 2d 943, cert. denied, 392 U.S. 908 .....25, 43

Witmer v. United States, 348 U.S. 375 .....9, 30, 34

Wolff v. Selective Service Local Board No. 15, 372 F. 2d 817 .....27, 29, 31

Young, Ex parte, 209 U.S. 123 37

Miscellaneous

Griffiths, Some Notes on the SG's Memorandum in Oestereich, 1 Sel. Serv. L. Rep. 4012 .....17, 19, 29

House of Representative Report No. 267, 90th Cong., 1st Sess. (1967), p. 10 14

House of Representative Report No. 267, 90th Cong., 1st Sess. (1967), pp. 22-27 39

Selective Service Law Report, Practice Manual, Par. 2 24

Page

Selective Service Law Report, Practice Manual, Par. 8.1 23

Selective Service Law Report, Practice Manual, Par. 1007 18

Selective Service Law Report, Practice Manual, Pars. 2408-10 26

Rules

Rules of the Supreme Court of the United States, Rule 36 3

Regulations

Code of Federal Regulations, Title 32, Sec. 1602.4 .. 2

Code of Federal Regulations, Title 32, Sec. 1622.10 19

Code of Federal Regulations, Title 32, Sec. 1622.11 19

Code of Federal Regulations, Title 32, Sec. 1622.13 19

Code of Federal Regulations, Title 32, Sec. 1622.20 18

Code of Federal Regulations, Title 32, Sec. 1622.25 .....2, 15, 18

Code of Federal Regulations, Title 32, Sec. 1622.25-(a) 14

Code of Federal Regulations, Title 32, Sec. 1622.25-(b) 14

Code of Federal Regulations, Title 32, Sec. 1622.30 18

Code of Federal Regulations, Title 32, Sec. 1622.40-(a)(1)-(9) 18

Page

Code of Federal Regulations, Title 32, Sec. 1622.40 (a)(10) 18

Code of Federal Regulations, Title 32, Sec. 1622.41 18

Code of Federal Regulations, Title 32, Sec. 1622.43 .....9, 18

Code of Federal Regulations, Title 32, Sec. 1623.2 .. 7

Code of Federal Regulations, Title 32, Sec. 1625.1(a) 8, 16

Code of Federal Regulations, Title 32, Sec. 1625.13 28

Code of Federal Regulations, Title 32, Sec. 1626.2 .. 4

Code of Federal Regulations, Title 32, Sec. 1631.7 .. 8

Code of Federal Regulations, Title 32, Sec. 1631.7-(a) 18

Code of Federal Regulations, Title 32, Secs. 1642.1-.46 .....2, 5

Statutes

Military Selective Service Act of 1967, Sec. 1(c) 32

Military Selective Service Act of 1967, Sec. 5(a)-(1) 2, 8, 17

Military Selective Service Act of 1967, Sec. 6(b) 18

Military Selective Service Act of 1967, Sec. 6(c) 19

Military Selective Service Act of 1967, Sec. 6(d) 19

Military Selective Service Act of 1967, Sec. 6(e) 18

Military Selective Service Act of 1967, Sec. 6(f) 18, 20, 21

Military Selective Service Act of 1967, Sec. 6(g) 9, 12, 18

Page

Military Selective Service Act of 1967, Sec. 6(h) 18

Military Selective Service Act of 1967, Sec. 6(h)-(1) .....2, 3, 11, 12, 13, 14 .....15, 17, 18, 39

Military Selective Service Act of 1951, Sec. 6(h)-(2) 17

Military Selective Service Act of 1967, Sec. 6(i)(2) 43

Military Selective Service Act of 1967, Sec. 6(k) 15

Military Selective Service Act of 1967, Sec. 6(o) 18

Military Selective Service Act of 1967, Sec. 10(b)-(3) 2, 5, 6, 10, 11, 13, 22, 26, 27, 29, 31, 32, 34

Military Selective Service Act of 1967, Sec. 12(a) 2, 29

Military Selective Service Act of 1967, Sec. 12(b)-(6) 2

Military Selective Service Act of 1967, Sec. 12(h)-(1) 42

Military Selective Service Act of 1967, Sec. 13(b) .. 35

Taft-Hartley Act, Sec. 9(b)(1) 22

Taft-Hartley Act, Sec. 10(c) 22

United States Code, Title 28, Sec. 1254(1) 1

United States Code, Title 28, Sec. 1361 26

United States Code App., Title 50, Sec. 451(c) 32

United States Code App., Title 50, Sec. 456(h)(1).. 3

United States Code App., Title 50, Sec. 456(h)(2) 17

United States Code App., Title 50, Sec. 456(k) 8

United States Code App., Title 50, Sec. 460(b)(3) 29

Page

United States Code App., Title 50, Sec. 463(b) 35
United States Constitution, First Amendment 2, 16
United States Constitution, Fifth Amendment 2
United States Constitution, Sixth Amendment 2

Textbooks

54 California Law Review (1966), p. 2123 .....11, 19
54 California Law Review (1966), p. 2124 19
54 California Law Review (1966), p. 2162 11
56 California Law Review (1968), p. 549 20
Hart & Wechsler, The Federal Court and the Federal System (1953), p. 325 32
81 Harvard Law Review (1969), p. 1439 36
Leonard & Frantz, Judicial Review of Selective Service Orders, 26 Nat. Law. Guild Practitioner (1967), p. 85 37
65 Statute at Large, p. 83 17
Wright, Federal Courts (1963), Sec. 10 33
77 Yale Law Journal (1968), p. 827 20
78 Yale Law Journal (1968), p. 338 35

IN THE

Supreme Court of the United States

October Term, 1969
No. 65

TIMOTHY J. BREEN,

Petitioner,

vs.

SELECTIVE SERVICE LOCAL BOARD No. 16, BRIDGEPORT, CONNECTICUT, and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of Selective Service for Connecticut,

Respondents.

On Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER.

Opinions Below.

The decision of the district court is reported at 284 F. Supp. 749 (D. Conn. 1968). The decision and opinion of the court of appeals is reported at 406 F. 2d 636 (2d Cir. 1969), and is reprinted in the Appendix at 8-22.

Jurisdiction.

The judgment of the court of appeals was entered on January 10, 1969. The petition for certiorari was filed March 10, 1969. This court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved.

U.S. Const., amend. 1

U.S. Const., amend. 5

U.S. Const., amend. 6

Military Selective Service Act of 1967, §§ 5(a)(1), 6(h)(1), 10(b)(3), 12(a), 12(b)(6)

32 C.F.R. §§ 1602.4, 1622.25, 1642.1—.46

Questions Presented.

1. Whether § 10(b)(3) of the Military Selective Service Act of 1967 precludes preinduction judicial review of the action of a local draft board in stripping a full-time undergraduate student of his statutory deferment provided under § 6(h)(1) of the Act, declaring him delinquent and ordering him to report for induction on the ground that as a personal conscientious protest against the war in Vietnam he turned in his selective service registration certificate.

2. Whether § 10(b)(3), as interpreted in *Oestereich v. Selective Service Bd.*, 393 U.S. 233 (1968), and *Clark v. Gabriel*, 393 U.S. 256 (1968), permits preinduction judicial review of violation by a board of any clear legal duty.

3. Whether the declaration of delinquency, punitive reclassification and order to report for induction of petitioner violate the first amendment, the due process clause of the fifth amendment, the sixth amendment, the Military Selective Service Act of 1967, and the selective service regulations.

Statement of the Case.

The following statement of facts is taken from the allegations of the complaint, taken as admitted for purposes of this proceeding by the government's motion to dismiss the complaint. *Clark v. Uebersee Finanz-Korporation,* 332 U.S. 480 (1947), and from the Agreed Statement of Facts on Appeal (Appendix, pp. 1-3).*

At all times relevant to this case, petitioner was a duly-enrolled full-time undergraduate student at the Berkeley School of Music, Boston, Massachusetts. He met the requirements for a II-S deferment under § 6 (h)(1) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 456(h)(1). He had been classified II-S by his draft board, Local Board No. 16, Bridgeport, Connecticut for the 1967-68 academic year.

On November 16, 1967, together with a number of other selective service registrants, petitioner delivered his registration certificate (SSS Form 2) to a clergyman, solely for the purpose of registering his dissent from participation by the United States in the war in Vietnam. Thereafter, he received a delinquency notice (SSS Form 304) mailed on January 9, 1968, informing him that he had been "declared delinquent" because of "Failure to have Registration Certificate in your possession." Simultaneously, on January 9, 1968, petitioner was reclassified from II-S to I-A by his local board.

As noted in the majority opinion below, these actions by Local Board No. 16 "were in line with a memoran-

*In this brief, references to "Appendix," without more, refer to the separate appendix filed under this Court's Rule 36. "Appendix A" refers to the appended statutes and regulations, bound with this brief.

dum and letter dated respectively October 24 and October 26, 1967, from the Director of Selective Service." (The letter and memorandum are reprinted as Appendix B to the Brief for Petitioner, *Gutknecht v. United States,* No. 71, O.T. 1969.) This memorandum and letter addressed to all local selective service boards advised the boards, among other things, to deny deferments to any registrant who takes part in "any action that violates the Military Selective Service Act." The declaration that petitioner was a delinquent and his reclassification to I-A were in compliance with General Hershey's instructions. The letter directed local boards to act on the basis of information received concerning so-called "illegal" demonstrations involving registrants such as the petitioner, on the strength of which classifications were to be reopened, the registrant classified anew,

> "and if evidence of violation of the Act and Regulations is established, also to declare the registrant to be a delinquent and to process him accordingly."

On January 11, 1968, Local Board No. 16 mailed petitioner an order to report on January 29, 1968, for a physical examination (SSS Form 223). This examination was subsequently postponed.

In February 1968, petitioner appealed his reclassification to the selective service appeals board under the provisions of 32 C.F.R. § 1626.2.[1]

On February 20, 1968, petitioner filed suit in the United States District Court, District of Connecticut, seeking a judgment that the declaration of his de-

[1]The operation of the delinquency regulations, including the right of certain reclassified registrants to appeal from the decision of the local board, is set forth in Brief for Petitioner, *Gutknecht v. United States,* No. 71, O.T. 1969, Point I, A.

linquency and his reclassification were null and void, an injunction against his induction into the armed forces, and $20,000 damages. Petitioner sought further to have the delinquency regulations, 32 C.F.R. §§ 1642.1—.46 declared unconstitutional on their face and as applied to him and to declare unconstitutional the letter and memorandum of General Lewis B. Hershey.

Respondents moved to dismiss the complaint on March 8, 1968, on the grounds of lack of jurisdiction, relying upon § 10(b)(3) of the Military Selective Service Act of 1967. Respondents also moved for dissolution of the temporary restraining order which had been issued by the Court on March 1, 1968. After hearing on March 8, 1968, the district court granted respondents' motion to dismiss, holding that the Court was deprived of jurisdiction by § 10(b)(3).

Subsequent to the decision of the district court, petitioner's administrative appeal was unanimously decided against him and he was ordered to report for induction. In April of 1968, pursuant to an order of his local board, petitioner submitted to a preinduction physical examination and was determined to be physically fit for military duty. His order to report for induction was stayed by the district court pending decision by the court of appeals. A further stay was granted by the court of appeals at the time of oral argument, which stay was extended by that court following its decision affirming the district court (one judge dissenting), on January 10, 1969.

Summary of Argument.

Petitioner argues, first, that this case is controlled by *Oestereich v. Selective Service Bd.*, 393 U.S. 233 (1968). The reclassification and order for priority in-

duction in this case came in the identical fashion and for the same reasons as that at issue in *Oestereich*. The possible distinction between petitioner's statutory "deferment" and Oestereich's statutory "exemption" is shown to be without basis in the holding of the Court in *Oestereich* and in the structure of the Military Selective Service Act of 1967.

Taking a somewhat broader view of this case, petitioner also contends that preinduction review should be available in any case in which a clear legal duty owed the registrant by the board is at stake. Permitting review in such cases is shown to prejudice no interest of the System, and to protect interests given consistent recognition in selective service decisional law.

Recognizing that *Clark v. Gabriel,* 393 U.S. 256 (1968), may be said to bar consideration of the issue, petitioner discusses the serious constitutional questions tendered by § 10(b)(3)'s restrictions on the scope and timing of judicial review in draft cases. Petitioner contends that even if not controlling, the constitutional questions raised require that § 10(b)(3) be given a narrow reading.

Turning to the validity of his reclassification, petitioner adopts and incorporates by reference the quite lengthy argument on this point in the petitioner's brief in *Gutknecht v. United States,* No. 71, O.T. 1969. He also argues that the statutory delinquency concept is not broad enough to sustain revocation of an immunity from induction unequivocally granted, and that the failure of the local board to give him proper notice prior to terminating his deferment and attempting to pull him out of school in the middle of the year violated the selective service regulations and due process of law.

ARGUMENT.

I.

SECTION 10(b)(3) OF THE MILITARY SELECTIVE SERVICE ACT OF 1967 DOES NOT BAR JUDICIAL REVIEW OF THE DELINQUENCY DECLARATION AND RECLASSIFICATION OF PETITIONER.

A. Oestereich v. Selective Service Board, 393 U.S. 233 (1968) Is Controlling and Requires Preinduction Relief by Way of Mandamus or Injunction.

The argument under I, A is in three parts. First, it is contended that a II-S undergraduate student deferment is analytically indistinguishable from the divinity student exemption considered in *Oestereich.* Second, it is urged that a distinction, for judicial review purposes, between deferments and exemptions would be irrational. Third, *Oestereich* is reanalayzed and a principle is suggested which accommodates the need for early judicial review in some cases with the asserted "manpower" needs of the Selective Service System.

1. Oestereich Requires Review Because a Statutory Right Is at Stake.

This Court's recent decision in *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968) controls this case. In *Oestereich,* as here, petitioner was a student classified as provided by statute in a classification category "lower" than I-A. See 32 C.F.R. § 1623.2 (1969) (setting forth the priority of classification categories and requiring that a registrant be placed in the "lowest class for which he is determined eligible"). As long as

his classification continued, Oestereich, like Breen, was effectively immune from induction into the armed forces.[2] Sec. 5(a)(1) of the Military Selective Service Act of 1967 authorizes the President to induct only those who are not "deferred or exempted." *Cf.* 32 C.F.R. § 1631.7, which provides for the induction of only those who are classified I-A and I-A-O. Like Breen, Oestereich abandoned his registration certificate as a form of personal, conscientious protest to the controversial war effort being waged by the government of the United States in Southeast Asia. Similarly, Breen, like Oestereich, was reclassified as a delinquent I-A by his local board without a hearing or judicial determination of the legal propriety of his acts; without the opportunity to "cure" the alleged violation of duty which was admittedly the grounds for the reclassification; without further consideration by the local board of the validity of the former classifications which it had granted; and pursuant to a November 8, 1967, letter from the Director of the Selective Service System, Lt. Gen. Lewis B. Hershey, to all local draft boards.[3] In each case, after exhausting all administrative remedies, efforts by the registrant to enjoin his local board from inducting him were unsuccessful in the district court and the court of appeals, and each petitioned this Court for certiorari. In *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968), this Court held that injunctive

---

[2]Of course, "[n]o classification is permanent," 32 C.F.R. § 1625.1(a), but this is true only because "[n]o exemption or deferment . . . shall continue after the cause therefor ceases to exist." 50 U.S.C. App. § 456(k). Breen was, at all times relevant to this case, a full-time student in good standing at the Berkeley School.

[3]Reproduced in *Appendix B to Brief for Petitioner, Gutknecht v. United States*, No. 71, O.T. 1969, and in the Petition for Certiorari in this case, pp. 59-62.

review would be allowed when a board acted in a clearly lawless manner and when the reclassification was based upon "activities or conduct not material to the grant or withdrawal of the exemption." 393 U.S. at 237. The Court noted as well that "the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards." *Id.* at 238-239. In allowing "early judicial review"[4] the Court held that the literal language of the Military Selective Service Act of 1967 must be read harmoniously with the "Act taken as an organic whole." 393 U.S. at 238. Because § 6(g) of the Act specifically provided for an "immune" classification in *Ostereich's* case (see also 32 C.F.R. § 1622.43 (1969)) the Court held that a registrant should not be enforced to select one of two perilous—and, in the case of refusal of induction, ignominious—procedures in order to gain judicial review to vindicate his statutory right[5] (if at all, for it is difficult to calculate how many men whose local boards have erred are hardy enough to press their claims in a criminal prosecution for induction refusal or a habeas corpus proceeding).[6] Thus, where the registrant's clas-

---

[4]Mr. Justice Clark, in *Dickinson v. United States*, 346 U.S. 389 (1953) and *Witmer v. United States*, 348 U.S. 375 (1956), used the term "direct judicial review" to refer to the same thing. See I, A, 3, *infra*.

[5]"To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. . . . Our construction leaves § 10(b)(3) unimpaired in the *normal* operations of the Act." 393 U.S. at 238 (emphasis added).

[6]See, *e.g.*, *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952) granting early judicial review because the Hobson's choice

(This footnote is continued on the next page)

sification immunizing him from induction was created by the statute, where the reclassification was not upon the basis of activities or conduct material to the original grant of classification, and where the reclassification was not pursuant to the statutory commands of the Act, § 10(b)(3) would not preclude early judicial review.

The *Oestereich* test, therefore, as further explained in the *per curiam* disposition of *Clark v. Gabriel*, 393

---

facing the registrant might chill his efforts to vindicate his rights in a court of law and because the board action was so patently outrageous; *Petersen v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968) holding § 10(b)(3) unconstitutional for having a chilling effect upon the assertion of the registrant's constitutional right to judicial review. Not only is the thought of defending a criminal prosecution unpalatable to most registrants, but so is the thought of contesting the classification once the registrant has submitted to the allegedly invalid order on *habeas*. Beyond the problem of being spotted as a trouble maker during the period of time when the petition is being considered by a court of law are the grave pragmetic problems of being able to present a meaningful case, often far from one's home. Mr. Jusice Murphy summarizes some of these problems in his concurrence in *Estep v. United States*, 327 U.S. 114 (1946) and concludes that "no more difficult condition precedent to judicial review" is known. The Solicitor General made this point well in his brief in *Oestereich*, pp. 60-61:

> "it is *possible* to have review only through criminal prosecution, or through habeas corpus, and to have the ministerial exemption recognized at that point. But there are difficulties. After a draft board issued a notice of induction, a registrant is surely in peril if he refuses to comply with it, and he may find himself effectively in service, if he does comply with it. It might be claimed that he had waived his exemption by responding affirmatively to induction [see *Gibson v. United States*, 329 U.S. 338 (1946)], and he may be held not to have exhausted his administrative remedies if he refuses to accept induction. See *Falbo v. United States*, 320 U.S. 549, 553. Moreover, he does not have an opportunity to find out in advance whether he is wrong, and to decide then whether to take the penalty or to accept the legal conclusion as to his status. He must take the risk in order to find out whether he is subject to a penalty."

U.S. 256 (1968), will allow review of a registrant's punitive reclassification where he previously held a statutorily granted non-inductible classification. Sec. 10(b)(3), as this Court held in *Gabriel,* is designed to limit judicial review to the criminal prosecution when the challenged board action is susceptible of a "basis in fact" review; that is, where the board acts within its "discretion."[7] The Military Selective Service Act of 1967, however, deprived local boards of all discretion in dispensing II-S deferments to undergraduates. The deferment which is granted to undergraduate students under the Military Selective Service Act of 1967 is now mandatory. Section 6(h)(1) provides in pertinent part:

> "Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university,

---

[7]See concurring opinion of Harlan, J., in *Oestereich,* 393 U.S. at 239; concurring opinion of Douglas, J., in *Gabriel,* 393 U.S. at 259. It should be noted that prior to 1967, "[l]ocal board autonomy in devising deferment and exemption standards [resulted] in 4,000 different conscription policies," Comment, 54 Calif. L. Rev. 2123, 2162 (1966). Of course in several other areas, notably those of I-O (conscientious objectors) and II-A (occupational) classifications, local boards retain much of their unfettered and uncontrolled discretion in deciding what standards are to be applied and who is to receive deferment. See the National Advisory Comm'n on Selective Service, In Pursuit of Equity, Who Shall Serve When Not All Serve? (1967) [The Marshall Comm'n Report]; Hearings on the Extension of the Universal Military Training & Service Act Before the House Comm. on Armed Services, 90th Cong., 1st Sess. (1967) (testimony of Burke Marshall); Local Board Memorandum No. 95, issued April 19, 1968, reprinted in Sel. Serv. L. Rep. at 2200:3.

> or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. . . ."

In the same manner, § 6(g) of the Act provides that ministry students shall not be required to train or serve for so long as they are satisfactory pursuing courses of instruction in recognized divinity schools (and upon graduation continue to be immune from service as ministers under the same section of the Act):

> "[S]tudents preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have preenrolled, shall be exempt from training and service (but not from registration) under this title."

Thus Congress has declared as a *national* policy that petitioner, under § 6(h)(1) of the Act, like Oestereich under § 6(g) of the Act, shall be immune from service

and training for as long as he meets the elementary statutory criteria.[8]

Indeed, § 6(h)(1) may be construed to be even stronger than the pertinent statutory provision in Oestereich, for it declares that undergraduate student deferments are not to be "substantially restricted or terminated" unless the President specifically finds that "the needs of the Armed Forces require such action." As Judge Feinberg correctly emphasized, citing authorities in his dissenting opinion below, reprinted in the Appendix, p. 18:

> "This is about as clear a statement of congressional intent as you can get, made all the more emphatic by its appearance in the Selective Service Act for the first time in the 1967 amendments."

It should also be noted that the 1967 Act changed the provisions of § 6(h)(1) so as to make student deferments mandatory, using the term "shall" in place of the prior discretionary language authorizing the President to provide for such deferement when "found to be necessary to the maintenance of the national health, safety, or interest. . . ." The importance of this change cannot be gainsaid. Unlike some of the 1967 amendments to the conscription law which bore signs of haste and Congressional pique,[9] the basic student deferment policy of § 6(h)(1)—though unhappily the section is not a model of draftsmanship—is

---

[8]The System makes it easy to get and keep the II-S by use of a simple form (SSS Form 109) which the registrant's school fills out and sends to the board. This form is reprinted at Sel. Serv. L. Rep. 2156:7.

[9]See, *e.g.*—§ 10(b)(3) of the Act, which the government conceded and the Court held in *Oestereich* cannot "sustain a literal reading." 393 U.S. at 238.

the product of an informed and deliberate Congressional choice. The Marshall Commission had recommended, by a closely divided vote and over a strong dissenting opinion, that student deferments be done away with. The panel headed by Mark Clark and named by Chairman L. Mendel Rivers (D-S.C.) of the House Armed Services Committee had strongly recommended that undergraduate student deferments be made the subject of mandatory legislation. The House Armed Services Committee concurred with the Marshall Commission dissenters and the Clark panel. See H.R. Rep. No. 267, 90th Cong., 1st Sess., at 10 (1967).

Prior to the 1967 amendments, the regulations left the deferment of individual students to the discretion of the local boards, 32 C.F.R. § 1622.25(a) (1965), and the promulgation of criteria to the Director of the Selective Service. 32 C.F.R. § 1622.25(b) (1965). There was no clearly expressed national policy on student deferments, either by statute or regulation.

The majority opinion in the court of appeals ignores the statutory language and the clear statutory commands of § 6(h)(1) by placing heavy emphasis on the phrase "under such rules and regulations as [the President] may prescribe." This ignores the introductory phrase of § 6(h)(1) which governs it, namely, "Except as otherwise provided in this paragraph . . ." This controlling language requires that a student deferment *"shall* continue" until and unless one of several specified events takes place, none of which have anything to do with an alleged delinquency for failure to possess one's draft card. The section, taken as a whole, does not visit any discretion upon the President to restrict the statutory grant of deferments, but

authorizes the making of procedural and definitional rules only. The power has been so construed by the President in making the implementing regulations, 32 C.F.R. § 1622.25 (1969). This reading of the prefatory language to § 6(h)(1) is supported by the occurrence, later in the subsection, of the following provision:

> "Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only on a finding that the needs of the Armed Forces require such action."

This language permits the President to restrict deferments, but only on a *finding* of the proper kind, and only by making regulations of general and uniform application. It demonstrates a Congressional intention to take away from *local boards* the power to interfere with student deferments under any circumstances. Sec. 6(h)(1) is, therefore, in harmony with § 6(k) which follows almost immediately after it and provides:

> "No exception from registration, or exemption *or deferment* from training and service, under this title, shall continue after the cause therefor ceases to exist."

The word "delinquents" in § 6(h)(1) is so obviously irrelevant to all provisions of that statute that it hardly merits attention.[10] But the majority opinion below distinguishes *Oestereich* by laying heavy emphasis upon the fleeting reference to that word in a definition of the phrase, "prime age group." However, just as in *Oestereich*, this statutory deferment is "plain and unequivocal . . . and since the scope of the statutory de-

[10]See Point II, *infra*.

linquency concept is not broad enough to sustain a revocation of what Congress has granted *as a statutory right* . . . judicial review is not precluded in cases of this type." 393 U.S. at 238-239.

The Court should, petitioner submits, also take notice of the context within which the reclassification in this case occurred. The Hershey letter and directive, as is argued at length in Brief for Petitioner, *Gutknecht v. United States,* No. 71, O.T. 1969, clearly trespass upon the first amendment. Petitioner's reclassification rested in part, as the courts below noted, upon the letter and directive. This unauthorized and primitive use of the delinquency power, at least equally with the character of the deferment of which petitioner was deprived, warrants preinduction review. See *Nat'l Students Ass'n v. Hershey,* .... F. 2d .... (D.C. Cir. 1969).

2. There Is No Meaningful Distinction Between "Exemptions" and "Deferments."

Nor, petitioner contends, may the government find refuge from the force of this argument by retreating to a purported distinction between "exemptions" and "deferments." In analyzing the delinquency concept as it was defined in *Oestereich,* such a distinction is fanciful, for it is not grounded in either the statutes or regulations in any way which gives it utility as an analytical tool. The dissenters in *Oestereich* point out that lifting the bar to early judicial review in cases involving statutory exemptions will require the Court, under analytically indistinguishable considerations of policy and construction, to lift it in cases involving statutory deferments which "just as 'plainly' preclude a registrant's induction." 393 U.S. at 249 n. 9. Since "no classification is permanent" 32 C.F.R. § 1625.1(a) and

all deferments and exemptions bar induction, Military Selective Service Act of 1967, § 5(a)(1), it is obvious that permanency is no distinction between exemptions and deferments and that whatever distinction between them there might have been before Congress made student deferments a statutory right under national policy no longer exists. Student deferments within the criteria of § 6(h)(1) are expressly provided for by statute, their grant requires no discretion on the part of the board, and punitive reclassification of a registrant who formerly held a II-S and remains clearly entitled to deferment should be the subject of early judicial review.

The "exemption-deferment" distinction is useful, petitioner contends, for one purpose and one purpose only: distinguishing between those classifications the granting of which extends a registrant's liability for service from age 26 to age 35, and those which do not involve an extension of liability. The extension of liability provision was added to § 6(h)(2) of the Act in 1951, 50 U.S.C. App. § 456 (h)(2). 65 Stat. 83. Indeed, since the Act does not define all immunities from induction as deferments or exemptions, there exists some question whether particular immunities fall under one heading or another. The Selective Service Director's list of "deferments" and "exemptions" appears highly arbitrary at points. Local Board Memorandum No. 38; *cf.* Griffiths, *Some Notes on the SG's Memorandum in Oestereich*, 1 Sel. Serv. L. Rep. 4012, 4014 (1968). And even the hypothetical difference between exemptions and deferments disappears when one realizes that a registrant whose liability is extended, but who is over 26, is placed in such a low priority for induction that he will not be

reached except in time of total national mobilization. 32 C.F.R. § 1631.7(a) (1969).

Meaningful analysis requires, therefore, the recognition of at least four kinds of classification categories: there are statutory exemptions from training and service[11] which can be identified as such,[12] deferments mandatorily and unequivocally granted by statute,[13] deferments for which the President may (or may not, in his discretion) provide by regulation or which are provided and require the local board to exercise its judgment concerning questions of grant or denial,[14] and, finally, classifications which do not determine whether

---

[11]There are also exemptions from registration, but since these operate to exclude their beneficiaries entirely from the jurisdiction of the Selective Service System, they are not relevant here. If the System wanted to challenge a nonregistrant about the interpretation of one of these, a civil declaratory judgment action or a criminal prosecution would have to be instituted. The exemptions from registration are catalogued and analyzed at Sel. Serv. L. Rep. Practice Manual ¶ 1007.

[12]Those exempt include veterans, § 6(b) of the Act and 32 C.F.R. § 1622.40(a) (1)-(9); sole surviving sons, § 6(o) and 32 C.F.R. § 1622.40(a) (10); ministers and ministry students, § 6(g) and 32 C.F.R. § 1622.43, although the Solicitor General has argued that others not specifically exempted by the terms of the Act should be so considered, for precisely the reasons that mandatory or statutory deferments should be accorded the juridical rights of exemptions. See Brief for Respondents, *Oestereich v. Selective Service Bd.*, 393 U.S. 233 (1968) at 65.

[13]Those given statutory deferments include, other than full-time undergraduate students (§ 6(h)(1) of the Act and 32 C.F.R. § 1622.25): the Vice President of the United States, the Governors of the several states and territories, and possessions, and all other officials chosen by voters of an entire state; members of legislative bodies and judges of courts of record, § 6(f) and 32 C.F.R. § 1622.41; aviation cadet applicants, § 6(e).

[14]Included in this category are occupationally deferred registrants, 32 C.F.R. § 1622.20 *et. seq.* and § 6(h) of the Act; and those deferred on grounds of family need (dependency), 32 C.F.R. § 1622.30 and § 6(h).

a registrant shall serve, but rather what type of service he will perform (combatant, noncombatant, civilian alternative service).[15] (In addition, there are the order of call categories which are at issue in *Gutknecht,* No. 71, O.T. 1969.)

In addition to these classifications, several others are variously and interchangeably described in the statute as deferments or exemptions[16] evidencing the fact that this statute, "a masterpiece of poor draftsmanship in every way"[17] which was "built hastily in an atmosphere of crisis in 1940,"[18] has never been thoroughly

---

[15]These include the availability classification of I-A, 32 C.F.R. § 1622.10, the noncombatant duty classification (I-A-O) for conscientious objectors, 32 C.F.R. § 1622.11, and the civilian work classification (I-O) for conscientious objectors. By properly denominating this entire group as "service determinators" much of the Solicitor General's fears of considering conscientious objectors as "statutorily deferred" and thus allowed "early" judicial review are removed. (See Brief for Respondents, *Oestereich v. Selective Service Local Board No. 11,* 393 U.S. 233 (1968) at 65.) It should be pointed out that during the period in which the registrant holds a I-O classification he is obligated to serve his country in civilian work contributing to the national interest, and thus it may be argued that he should normally be required under all circumstances to exhaust his remedies by submitting to the order to report for civilian work before attempting to gain judicial review. See *Clark v. Gabriel,* 393 U.S. 256 (1968). A different case would be presented, however, if, having held a I-O classification, a registrant was then punitively reclassified. Then, even though the classification required board discretion and was subject to basis in fact review, the fact that it had formerly been given and was withdrawn for conduct not material to the original extension of the classification might allow for early review. *Cf. Clark v. Gabriel,* 393 U.S. at 259-260 (Douglas, J., concurring).

[16]See §§ 6(c) & (d) of the Act. The regulations remain neutral in light of this language and do not identify these classifications as deferments or exemptions. See 32 C.F.R. § 1622.13.

[17]Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich,* 1 Sel. Serv. L. Rep. 4012, 4014 (1968).

[18]Comment, 54 Calif. L. Rev. 2123, 2124 (1966); *cf. Falbo v. United States,* 320 U.S. 549 (1944).

amended to remove the structural deficiencies or ambiguities which abound.[19]

Thus, "exemption" and "deferment" are not terms of art expressing that in the one case national policy would provide for a mandatory exclusion or exception from service, and in the other Congressional intent was to allow the President or local boards discretion to determine whether exceptions should be granted in certain authorized categories, and within those categories to whom. It is this presence or lack of discretion which *Oestereich's* rationale makes controlling. And see Harlan, J., concurring, 393 U.S. at 239. Thus, the Vice President of the United States is deferred *mandatorily* by the terms of § 6(f) of the act:

> "The Vice President of the United States . . . shall, while holding [office], be deferred from training and service . . ."

Can it be said that the "exemption" for ministry students is any more clear?

Sec. 6(f) also grants a deferment to "judges of the courts of record of the United States." See *Estep v. United States,* 327 U.S. 114, 121 (1946). If the President should nominate and the Senate confirm a Justice of this Court who was 32 years of age[20] and who, by virtue of having had a deferment, was liable for military service, and the local board took away his IV-B deferment under the delinquency power because it disagreed with his judicial opinions, would the Justice have to refuse to submit to induction and defend a criminal

---

[19]See, *e.g.*, White, *Processing Conscientious Objectors' Claims: A Constitutional Inquiry,* 56 Calif. L. Rev. 549 (1968), Griffiths, Book Review, 77 Yale L. J. 827 (1968).

[20]Joseph Story was 32 when appointed.

prosecution or, in the alternative, submit to induction, don the uniform of the Army and litigate through petition for habeas corpus? Such a remorselessly narrow reading of *Oestereich* could not be required by any rational considerations of deference to Congress or the Executive Branch; indeed, such a reading would, equally with a denial of relief in *Oestereich,* frustrate the Congressional intention expressed in § 6(f)'s mandatory terms. See *Schwartz v. Strauss,* 206 F. 2d 767, (2d Cir. 1953) (Frank, J., concurring).

Thus, whatever distinction is to be drawn between the classification decisions which are properly the subject of early judicial review and those which are not, that between deferments and exemptions would not be rational. See *Nat'l Students Ass'n v. Hershey,* .... F. 2d .... (D.C. Cir. 1969) (slip op., p. 33).

3. Early Judicial Review Should Be Available to Test Any Alleged Board Violation of a Clear Legal Duty Owed the Registrant.

In *Clark v. Gabriel,* 393 U.S. 256 (1968), the Court, in refusing preinduction review to test the board's denial of a conscientious objector exemption following the normal classification procedure, distinguished *Oestereich* as follows:

> "In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by statute and not dependent upon an act of judgment by the board." 393 U.S. at 258.

Here, petitioner urges, is the central meaning of *Oestereich,* from which a general rule of early judicial re-

view may be fashioned. One begins with the premise that § 10(b)(3) is not to be literally and unquestioningly applied to force every registrant, however clearly and scandalously aggrieved by the Selective Service System, to risk loss of liberty in order to gain judicial review.

Restricting statutory bars on judicial review of administrative action to the usual and general run of cases in which the administrator is exercising judgment and using discretion is nothing new. In *Leedom v. Kyne*, 358 U.S. 184 (1958), the Court had before it the judicial review preclusion provisions of § 10(c) of the Taft-Hartley Act. The NLRB had, on the undisputed facts, placed in the same bargaining unit both professional and nonprofessional employees, in flat contradiction of § 9(b)(1) of the Act. The professionals, through their employees' association, sued to set aside the board's order, and were met with the contention that § 10(c) of the Act bars judicial review except in a proceeding brought to enforce an order of the board restraining an unfair labor practice. The Court held for the professionals on the ground that the statutory right not to be placed in the same bargaining unit would be undermined by an unduly literal reading of the judicial review limitation. The action of the Board, the Court held,

> "deprived the professional employees of a 'right' assured to them by Congress. Surely in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." 358 U.S. at 189.

Leedom—as did *Oestereich*—applies to questions of "ripeness," or the timing of judicial review, a doctrine

often used in cases involving "exhaustion of administrative remedies." Just last Term, in *McKart v. United States*, ... U.S. ..... (1969), the Court held that a registrant clearly entitled to a "sole surviving son" classification would not be denied judicial review for failure to take administrative appeals available to him within the Selective Service System.

Whatever the provenance of the "no deference" doctrines of *Leedom, Oestereich* and *McKart,* their essential utility is easily demonstrated. Rules concerning judicial review of administrative action are designed to enable the administrator to do his job, to defer to his expertise (or at least to his statutorily-delegated discretion), and to keep cases out of court as long as possible in the hope that they will be settled within the administrative agency itself. In the case of the Selective Service System, Congress limited judicial review so that the vital business of raising an army would not be hindered by litigation. But that congressional judgment begins and does not end inquiry. World War II may have required total mobilization at the cost of delaying judicial review. Today, only a small minority of registrants are classified as available for service, and few of these are in any immediate danger of induction. The Selective Service System always more than fills its quota. An induction order, once issued, remain outstanding so that a registrant who commences a civil suit will not by becoming older escape liability for service. (This often happens in cases in which a registrant refuses to submit to induction and then is acquitted after reaching 26. *Cf.* Sel. Serv. L. Rep., Practice Manual ¶ 8.1).[20a] Surely, by applying familiar principles to

[20a] See *Nat'l Students Ass'n v. Hershey*, ... F. 2d ....., ... n. 17 (D.C. Cir. 1969).

isolate those cases and questions which courts possess special competence to resolve and which require no extensive factual inquiry, a workable rule of early judicial review can be made which accommodates the governmental interest in raising armies.

The Military Selective Service Act of 1967, like its predecessors since 1917, gives principal responsibility for fact-gathering and decision-making to local selective service boards composed of civilians and acting in most cases with a great deal of discretion. See Sel. Serv. L. Rep., Practice Manual ¶ 2; Nat'l Advisory Comm'n on Selective Service, In Pursuit of Equity; Who Serves When Not All Serve? (1967); Davis & Dolbeare, Little Groups of Neighbors (1968). Decisions concerning such matters as whether a registrant's induction will cause hardship to his dependents, whether his occupation is filling a vital community need, or whether he is a sincere religious objector to war, are subjected to a narrow judicial review only at the end of the selection process. The board's decision will at that time be upheld unless it has no basis in fact. This rule, however cogent the criticism to which it is subject, goes to great—indeed, unprecedented—length to defer to the discretion of the local board. But this Court has recognized that when weighing of facts is not involved, this claim of the System to deference is given scant attention. This Court has held that when any agency of the Selective Service System has misinterpreted the law relating to deferment or exemption, *e.g., Sicurella v. United States,* 348 U.S. 385 (1955); *McKart v. United States,* .... U.S. .... (1969), or where a procedural error has hindered the registrant in pursuing his claim for deferment or exemption, *e.g., Simmons v. United*

States, 348 U.S. 397 (1955); *Boswell v. United States,* 390 F. 2d 181 (9th Cir. 1968), the System's classification decision is to be surely and swiftly overturned without consideration of the deference due the board's expertise or discretion. Some rights, it seems, are principally in the keeping of courts, and the interpretation of statutes is the judiciary's special province. See *McKart v. United States, supra; Wills v. United States,* 384 F. 2d 943 (9th Cir. 1967), cert. denied, 392 U.S. 908 (1968).

Another element remains to be considered: the bar to early judicial review is generally designed to keep cases out of court in the hope they will be settled within the agency. This issue is irrelevant to a case in which the registrant's last and only remedy is the relatively insignificant final trip to the induction center, see *McKart v. United States, supra,* and the dispute is whether he shall surrender himself into military custody or make himself subject to indictment as a prerequisite to gaining an authoritative judicial determination of his liability for service. The only way in which forcing him to take one or the other of these choices serves an interest in keeping cases out of court is by making judicial review so costly the registrant is likely to acquiesce in the System's error. Judicial convenience should not be purchased at such a price. *Cf. Bantam Books v. Sullivan,* 372 U.S. 58 (1963). See note 6 *supra.*

The above analysis suggests that judicial review should be available when there is little prospect of hindering the System of raising an army, and when the issue does not involve considerations of local board discretion or expertise. *Cf.* concurring opinion of Harlan, J., *Oestereich v. Selective Service Board,* 393 U.S. at

239. Such a rule would not do violence to Congressional intent or to the language of § 10(b)(3).

Sec. 10(b)(3) refers literally to the "basis in fact" test of the validity of local board action, incorporating the language of *Estep v. United States,* 327 U.S. 114, 122 (1946). Yet, as the cases cited above demonstrate, this Court and the lower courts grant review of Selective Service decisions upon at least two grounds in addition to "no basis in fact," these being "error of law" and "procedural error." See also Sel. Serv. L. Rep., Practice Manual ¶¶ 2408-10. The "basis in fact" test refers only to review of board decisions which involve the weighing of evidence. See *Clark v. Gabriel,* 393 U.S. 256 (1968). Yet no one would contend that enactment of § 10(b)(3) is intended to restrict the scope of judicial review, or to do away by legislation with the consistent course of decision in this Court and the lower federal courts. See *United States v. Lybrand,* 279 F. Supp. 74 (E.D.N.Y. 1967). The thrust of § 10(b)(3) thus appears to be directed at ensuring respect for board determinations of *fact.* In this case, however, there is involved only a determination of legal rights and duties unaccompanied by complex or contested issues of fact.

Petitioner suggests that this distinction between board functions to which discretion is due and those to which it is not provides a rational basis for determining when early judicial review shall be available and when not. If this is the test in *Oestereich,* as the *Gabriel* opinion strongly suggests, 393 U.S. at 258, then as a general rule the availability of early judicial review will be co-extensive with the availability of relief in the nature of mandamus under 28 U.S.C. § 1361, with all

the jurisdictional and venue advantages which that section confers.[21]

The suggestion that judicial review should be available prior to induction when the board is manifestly in default of a clear legal obligation, or when its conduct is "manifestly outrageous," finds support in the purpose and central meaning of § 10(b)(3). For § 10 (b)(3) was a prophylactic statute, designed to prevent judicial lawmaking by legislating the rule in *Estep v. United States,* 327 U.S. 114 (1946). But cases properly following *Estep* in the years between 1946 and 1967 had allowed early judicial review when board action was manifestly outrageous. These cases were *Tomlinson v. Hershey,* 95 F. Supp. 72 (E.D. Pa. 1949); *Ex parte Fabiani,* 105 F. Supp. 139 (E.D. Pa. 1952); *Townsend v. Zimmerman,* 237 F. 2d 376 (6th Cir. 1956); *Wolff v. Selective Service Local Board No. 15,* 372 F. 2d 817 (2d Cir. 1967).

In *Tomlinson,* the district court refused to dismiss the complaint for declaratory judgment and injunction, without extensive discussion of a rationale for granting early review. Tomlinson apparently did not pursue his suit, however.

In *Fabiani,* the registrant was an American medical student of Italian descent studying in Italy because no

---

[21]The Court may decide that, in line with the literal language of *Gabriel,* cited in the text, early judicial review will be available only when rights of *statutory* provenance have been violated. Such a limitation seems indefensible. An agency is bound by the due process clause to obey its own *regulations, Vitarelli v. Seaton,* 359 U.S. 535 (1959), and clear constitutional violations appear just as important to guard against as violations of statute. See *Wolff v. Selective Service Local Board No. 15,* 372 F. 2d 817 (2d Cir. 1967); *Dombrowski v. Pfister,* 380 U.S. 459 (1965).

American, British or Canadian medical schools had accepted him. His local board chairman, a veterinarian, did not think Fabiani's medical school, the University of Rome, would be qualified to grant an accredited degree and had previously attempted to discourage him from attending there. After Fabiani had been in Rome several months, his local board reclassified him and ordered him to report for induction. When he would not return, the local United States Attorney threatened prosecution. Fabiani then returned to the United States and petitioned for habeas corpus, claiming that the issuance of an order to report for induction placed him in constructive custody. The court held that the outrageous, clearly illegal board action in depriving him of deferment warranted preinduction review. The court's holding that Fabinai was "in custody," was cited with approval in *Jones v. Cunningham,* 371 U.S. 236, 240 n. 11 (1963).

Townsend, cited with approval in *Oestereich,* 393 U.S. at 238, involved a local board refusal to reopen the registrant's classification. Judge (now Justice) Potter Stewart's opinion appears to rest upon the board chairman's bad faith in not reporting information given him by the registrant to the local board, the board's refusal to give the registrant a classification provided in the regulations to which he was clearly entitled, and (as appears in Justice Douglas's opinion in *Oestereich*) a board member's amorous interest in the registrant's wife. 393 U.S. at 237. At the least, the court held, the board's action should have been taken in a manner which would give the registrant his right of appeal from the local board's decision under 32 C.F.R. § 1625.13 (1969).

Wolff involved punitive reclassification of registrants who had participated in a sit-in at a local draft board. The court's holding rested upon the constitutional implications of punitive reclassification designed to punish arguably protected speech, and on the local board's lack of authority to use the delinquency power to reach conduct which § 12(a) of the Act made clear was to be punished in the criminal courts and there only. These four cases, it is submitted, properly interpret the rule in *Estep. v. United States,* 327 U.S. 114 (1946). *Estep* construed the statutory provision, now contained in § 10(b)(3) of the Act, 50 U.S.C. App. § 460(b)(3), making decisions of selective service boards "final." The Court held that "final" did not mean "subject to no judicial review" but rather betokened a Congressional intention severely to restrict the *scope* of judicial review. Only when the local board's decision lacked a "basis in fact" was it to be overturned. As pointed out above, the "basis in fact" test is not the only test of validity of board decisions. In any case, the Court's holding in *Estep* did not speak to the timing of judicial review, except to distinguish the earlier case of *Falbo v. United States,* 320 U.S. 549 (1944), in which judicial review had been denied, as one involving a failure to go to the brink of induction and exhaust all possible means of mooting the controversy by an administrative declaration of unsuitability for service. *Falbo,* as thus interpreted, deals not with the timing of review, but with the necessity of exhausting administrative remedies. See *McKart v. United States,* ..... U.S. ..... (1969). Griffiths, *Some Notes on the SG's Memorandum in Oestereich,* 1 Sel. Serv. L. Rep. 4012, 4014 n. 13 (1968).

Some lower courts, however, took *Estep* as signalling that no review was ever to be granted except in a criminal prosecution for refusal to submit to induction or in a habeas corpus proceeding.[22] These cases were *Lynch v. Hershey,* 208 F. 2d 523 (D.C. Cir. 1953); *Schwartz v. Strauss,* 206 F. 2d 767 (2d Cir. 1953), *aff'g* 114 F. Supp. 439 (S.D.N.Y. 1953); *Hirsh v. Adair,* 113 F. Supp. 116 (E.D. Pa. 1953); *Permutt v. Armstrong,* 112 F. Supp. 247 (N.D. Ill. 1953); *Westerbeke v. Local Draft Board No. 2,* 118 F. Supp. 441 (E.D.N.Y. 1954); *Rumsa v. United States,* 212 F. 2d 927, 937 (7th Cir. 1954); *Watkins v. Rupert,* 224 F. 2d 47 (2nd Cir. 1955); *Reap v. James,* 232 F. 2d 507 (4th Cir. 1956); *Tamarkin v. Selective Service Bd. No. 47,* 243 F. 2d 108, 109 (5th Cir. 1957); *Sorenson v. Selective Service Bd. No. 107,* 203 F. Supp. 786 (E.D. Pa. 1962); *Feldman v. Local Bd. No. 22,* 239 F. Supp. 102 (S.D.N.Y. 1964); *Muhammad Ali v. Connally,* 266 F. Supp. 345 (S.D. Tex. 1967).

Of these cases, *Reap* and *Tamarkin* rely in part upon the *Witmer* and *Dickinson* dicta discussed in note 22 *supra, Permutt, Westerbeke* and *Rumsa* rested upon an alleged failure to "exhaust administrative remedies," and *Schwartz,*[23] *Watkins, Feldman* and *Muhammad Ali* rely upon both notions. *Lynch* contains no basis for the court's holding. *Hirsh* relies upon the equitable doctrine

---

[22]In so holding, some courts drew support from dicta in *Witmer v. United States,* 348 U.S. 375, 377 (1956), and *Dickinson v. United States,* 346 U.S. 389, 394 (1953). But *Dickinson* and *Witmer* were "basis in fact" cases, and in *Dickinson* the rule in *Estep* was recognized to govern the *scope* of review.

[23]Judge Frank's concurrence expressed the view that the question of jurisdiction was coterminous with that on the merits, and found that the plaintiff should not prevail on the merits. 206 F. 2d at 767.

of "unclean hands," and thus supports early review since the court did not reach the government's contention concerning the unavailability of early review. *Sorenson* acknowledged the early review cases but held that the special circumstances which underlay them were not present, then appeared to rest decision upon justiciability and improper service of the complaint.

The cases denying review therefore either support the view that such review is *available* in a proper case,[24] or are based upon a misinterpretation of the *Falbo-Estep* rule.[25]

Moreover, cases since *Oestereich* have recognized the "manifestly outrageous" or "clear legal error" rationales for early judicial review, in granting relief to students whose statutory I-S deferments were denied to them under the Selective Service System's mistaken interpretation of the law. See, *e.g., Foley v. Hershey,* 409 F. 2d 827 (7th Cir. 1969); *Bowen v. Hershey,* 37 U.S.L.W. 2581 (1st Cir. Mar. 26, 1969); *Carey v. Local Bd. No. 2,* 297 F. Supp. 252 (D. Conn. 1969), *aff'd,* .... F. 2d .... (2d Cir. 1969).

These decisions, it is submitted, well reflect the teaching of *Oestereich* and *Gabriel.* A rule of judicial review which leaves § 10(b)(3) unimpaired in the review of local board's discretionary decisions, weighing the evidence in the registrant's file and making judg-

---

[24]The Second Circuit's decision in *Wolff* casts doubt upon the viability, as of 1967, of some authority among the "no early review" line of decisions, for it appears to adopt the theory of Judge Frank's concurrng opinion in *Schwartz.*

[25]It is not novel that this should happen. As Justice Frankfurter pointed out in dissent in *Estep,* the lower courts' interpretation of *Falbo* did not bear examination when in *Estep* the Court came to consider the availability of judicial review. 114 U.S. at 139.

ments about dependency or community need, but permits early review when the question is one of law unbeclouded with factual controversy serves both the need to raise an army and the Congressional command that the system of selection "fair and just." Military Selective Service Act of 1967, § 1(c), 50 U.S.C. App. § 451 (c).

B. Section 10(b)(3) Is Unconstitutional. If Not, the Constitutional Issues It Tenders Require That It Be Read Narrowly.

The issue of § 10(b)(3)'s constitutionality was here last term in *Clark v. Gabriel,* 393 U.S. 256 (1968), but did not receive plenary consideration. Petitioner raises this question not only because it warrants the Court's renewed examination, but because the considerations here advanced support as well the narrow reading of § 10(b)(3) urged in I, A, *supra.* This case does not present the first occasion on which the Selective Service law must be interpreted "in the candid service of avoiding a serious constitutional doubt," Douglas, *J.,* concurring in *United States v. Seeger,* 380 U.S. 163, 188 (1965).

In the current Act, Congress has established a system which relies upon the judiciary for enforcement, yet permits court to make only limited inquiry into the legality of board orders.

Estep v. United States, 327 U.S. 114, 119 (1946). Penal coercion is the method by which Congress has attempted to ensure compliance with board orders. The implications of this use of the courts are important.[26]

[26] "[S]o long at least as Congress feels impelled to invoke the assistance of the courts, the supremacy of law in their decisions is assured," Hart & Wechsler, The Federal Court and the Federal System 325 (1953).

Though Congress may have the power, within limits yet undetermined, to withdraw from the judiciary the power to hear some issues altogether,[27] the validity of restricting judicial prerogatives is less certain when, as with Congressional action in the Military Selective Service Act of 1967, the federal judiciary is granted *some* role. By using the courts merely as an enforcing and validating mechanism Congress arguably has overstepped the limits upon its power to dictate to a coordinate branch of government. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), and *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872), stand for the proposition that an Article III court granted the power to adjudicate some of the issues at stake in a particular case has the power to reach and decide every legal and constitutional claim raised as a potential bar to the exercise of its authority:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . ." *Marbury v. Madison,* 5 U.S. at 177.

Moreover, the rule in *Klein* is that once the courts are granted jurisdiction to decide claims, their role cannot be reduced to that of a rubber stamp by making factual determinations of a nonjudicial body conclusive. In *Klein,* the Court was granted jurisdiction to review awards of the Court of Claims, but was told that once certain facts appears, it was bound to indulge a nonrebuttable presumption which required reversal of the

---

[27]See Wright, Federal Courts § 10 (1963); *cf. Ableman v. Booth,* 62 U.S. 506 (1859); *Pennsylvania Turnpike Comm'n v. McGinnis,* 179 F. Supp. 578 (E.D. Pa. 1959).

judgment allowing the respondent's claims. This, said the Court, amounted to a trespass by Congress upon the province of the judiciary.

Sec. 10(b)(3) violates the basic separation of powers doctrine of *Marbury* and *Klein*, for it makes local board factual determinations conclusive and makes the price of even the narrow judicial review granted so high that most victims of local board error—or even caprice—will likely choose to forego seeking vindication of their rights. These two barriers to judicial review—the scope of review and the timing of review, deserve independent analysis.

1. The Basis in Fact Test.

The role of the courts in reviewing local board decisions of fact is limited to searching the registrant's selective service file to find some evidence inconsistent with his claim. See *Cox v. United States*, 332 U.S. 442 (1947); *Witmer v. United States*, 348 U.S. 375 (1956); *Dickinson v. United States*, 346 U.S. 389 (1953); *United States v. Washington*, 392 F. 2d 37 (6th Cir. 1968) (summarizing the law). Yet this attitude of the courts, conditioned by the language of § 10(b)(3) really comes to this: If there is any scrap of evidence upon which the board might have relied, the court will uphold its action.[28]

In effect, the basis in fact test asks courts to validate losses of liberty by registrants, or in the case of refusal

[28]The "error of law" and "procedural error" bases of review discussed above mitigate the harshness of this rule somewhat. But they are of minimal relevance in the vast majority of cases, for boards are not required to give reasons for their decisions and can thus insulate the legal bases of their decisions from review and accept the minimal risk that the court will not find some item in the file on which the board *might* have relied.

of induction prosecutions, to enter judgment of conviction for a felony,[29] while depriving them of the right to inquire whether there exist the facts which by statute and regulation are prerequisite to this loss.

Petitioner recognizes that judicial review of agency action is seldom granted in generous measure and that deference is the rule rather than the exception. But the agency decisions to which such deference is given are made on the record, after a hearing, by agency personnel kept insulated from the prosecutive function, and the parties are entitled to be represented by counsel. The Selective Service System, by contrast, is exempt from the adjudicative requirements of the Administrative Procedure Act. Military Selective Service Act of 1967 § 13(b), 50 U.S.C. App. § 463(b). Nor does the selective service registrant deal with a decision-maker who in any sense can be termed an "expert." There is no orderly, efficient consistent means by which local board members are kept abreast of regulatory and decisional law changes which affect their work. Local board arbitrariness or hostility is also a factor, and there is ample proof that it is a significant factor in the Systems' operation. See generally Davis & Dolbears, Little Groups of Neighbors (1968); Nat'l Advisory Comm'n on Selective Service, In Pursuit of Equity: Who serves When Not All Serve? (1967). *Cf.* Wright, Book Review, 78 Yale L. J. 338 (1968).

Thus, the "basis in fact" test operates to deny registrants any federal forum which will give a meaningful hearing on their claims to enjoy that which Con-

---

[29]In criminal cases, the question is more serious yet. See *Leary v. United States*, ... U.S. .... (1969); *United States v. Gainey*, 380 U.S. 63, 74 (1965) (Black, *J.*, dissenting).

gress by statute and the President by regulation has said they are entitled to have. *Cf. Oestereich v. Selective Service Bd.*, 393 U.S. 233, 243 (1968) (Harlan, *J.*, concurring). By legislating the basis in fact test, Congress has set up a system of governmental benefits, but conditioned their enjoyment upon the intended recipient surviving a process in which the probative force of his evidence that he is entitled to the benefit is not the governing factor. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1969). The basis in fact test gives the Selective Service System too large a margin of error to be tolerated in a scheme of regulation in which personal liberty is at stake. Within this margin of error, boards are left free to be arbitrary and to make irrational distinctions between registrants who make the same factual showing.

Perhaps the Congress need not provide any review at all of Selective Service decisions—that is a matter we need not consider, though it is fraught with constitutional questions. See *Estep v. United States*, 327 U.S. 114, 120 (1946). But having provided a system of review, the system may not indulge or permit arbitrary distinctions between the claims it will hear and those which it will not. See *Griffin v. Illinois*, 351 U.S. 12 (1956). Nor can Congress bind the court to be heedless of the facts which make up the aggrieved party's claim. *United States v. Klein, supra.* Indeed, a court denies due process when, its aid having been invoked, it declines to give appropriate weight to facts upon which loss of liberty may depend. *Cf. Thompson v. Louisville*, 362 U.S. 199 (1960). And this is because once it is "in the act," *the court* is the decision-

maker and cannot escape responsibility for its decision by claiming that one of the parties was the real mover. *Shelley v. Kraemer,* 334 U.S. 1 (1948).

The central role of courts in safeguarding personal liberty has led this Court to lay down detailed rules concerning determinations on appeal involving the possibility that a criminal defendant has been prejudiced by introduction of evidence which, as a matter of extrinsic policy, should have been excluded. *E.g., Chapman v. California,* 386 U.S. 18 (1966). No loss attention should be given to safeguarding the reliability of the fact-determining process when questions of the reliability and probative force of evidence are at stake.

2. The Timing of Review.

This Court has considered arguments addressed to the chilling effect on the registrant's right to judicial review—and therefore on his substantive right to be properly classified—of a provision which requires that he risk loss of liberty in order to obtain review. *Ex parte Young,* 209 U.S. 123 (1908); Leonard, & Frantz, *Judicial Review of Selective Service Orders,* 26 Nat. Law. Guild Practitioner 85 (1967); *Peterson v. Clark,* 289 F. Supp. 949 (N.D. Calif. 1968).

But the papers in *Clark v. Gabriel,* 393 U.S. 256 (1968), did not discuss the impact of deferred judicial review upon local selective service boards and the System generally. The crucial question in governing a System which the Congress has commanded shall be "fair and just" is how to check board discretion to ensure that like cases are decided alike and that in areas (such as concientious objection) where complex factual questions visit discretion in fact but important rights of religious

freedom are at stake, see *United States v. Sceger,* 380 U.S. 163 (1965), the board applies proper criteria. Prompt judicial review, which defines the rights of parties with certainty, is essential to police the operations of the System. *Cf. Dombrowski v. Pfister,* 380 U.S. 459 (1965). In the context of selective service procedure, judicial review at the time of board misconduct is the only means to bring the law into the life of the System.

II.

THE SELECTIVE SERVICE DELINQUENCY REGULATIONS, 32 C.F.R. PART 1642, ARE INVALID ON THEIR FACE AND AS APPLIED TO DENY PETITIONER HIS STATUTORY II-S CLASSIFICATION.

Petitioner adopts and incorporates by reference the arguments advanced in Brief for Petitioner, *Gutknecht v. United States,* No. 71, O.T. 1969, Point I. The arguments below will discuss only questions concerning the delinquency regulations which are peculiar to this case.

1. The Application of Oestereich.

The decision of this Court in *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968), seemed at times to make the question of preinduction judicial review coterminous with the merits of denying petitioner his classification. There is nothing inherently illogical or unprecedented about such an analysis, see *Leedom v. Kyne,* 358 U.S. 144 (1958), despite the criticism in *Oestereich,* 393 U.S. at 249. But there is an isolable issue on the merits in this case, as there was in *Oestereich* and in *Leedom.* The Congress has granted a II-S undergrad-

uate deferment to every registrant who meets certain simple criteria. Is the grant so unequivocal as to fall below the dignity of that in *Oestereich* and *Leedom?* Is there elsewhere in the statute an authorization for a local board to take away that which is given by Congress upon grounds unrelated to the Congressionally-established criteria? Petitioner answers no to both these questions.

The court of appeals rested its decision upon the language in § 6(h)(1) of the Act, "the President shall, under such rules and regulations as he may prescribe." Given the mandatory "shall," the express limitation upon the President's power to restrict student deferments later on in § 6(h)(1), and the Congressional state of mind concerning the student deferment, H.R. Rep. No. 267, 90th Cong., 1st Sess, at 22-27 (1967), it is difficult to regard this language as other than an authorization to make procedural rules for carrying out the legislative will.

The second question above is answered at length in the *Gutknecht* brief. Focussing narrowly upon the II-S deferment, however, the "statutory delinquency concept", 393 U.S. at 239 if such there be—refers no more to student deferments than it does to those preparing for the ministry. Here as in *Oestereich* the Congress has spelled out with some precision the standards to be employed in granting the immunity from service: the President *shall* provide, the statute says, for deferment of everyone within a specified class of registrants. Exceptions to that explicit statutory command should, on general principles of construction, be explicit as well, and authority to take away the statutory grant should not be inferred from language elsewhere in the statute

which is no vague as to have no meaning and so spare as to have no significance. See *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 228-29 (1957).

Therefore, whether or not the delinquency power is found to be constitutional and warranted by the statute as a general matter, it is not broad enough to justify stripping petitioner of his deferment.

2. The System's Failure to Provide Petitioner Notice Before Terminating His Deferment Makes Its Action Invalid.

Timely and adequate notice is one of the cardinal principles of procedural fairness, and it is probably the procedural requirement which the courts have been compelled most often to enforce—whether by demanding adherence to a regulation requiring notice, or by invoking due process directly—in selective service cases. In the case of alleged "delinquents" the regulations are explicit on the subject of notice. Reg. 1642.4-(a) provides that a Local Board "may declare [a registrant] to be a delinquent" if he failed to perform a duty required of him. Reg. 1642.4(b) provides that

> "When the local Board declares a registrant to be a delinquent, it . . . shall complete a Delinquency Notice (SSS Form 304) . . . setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant. . . ."

Finally, Reg. 1642.10 provides that

> "So delinquent registrant shall be placed in Class I-A, Class I-A-O . . . unless the local board has declared him to be a delinquent in accordance with the provisions of Section 1642.4 and thereafter has not removed him from such delinquency status."

The orderly procedure contemplated by these regulations (and the rest of Part 1642) could hardly be clearer: (1) information comes to the attention of the Local Board indicating that a registrant is delinquent; (2) the Local Board declares that this is the effect of the information, and notifies the registrant; (3) the registrant is afforded a reasonable time to clear up the matter (see Reg. 1642.4(c)); (4) only if, after a reasonable time, the board "has not removed him from such delinquency status" may it proceed to reclassify him based upon his delinquency status (Reg. 1642.12). SSS Form 304 is itself perfectly explicit as to its purpose. It tells the registrant why he has been placed in delinquency status, it directs him to communicate at once with his Local Board or to seek advice from the Local Board nearest him, and it notifies him that his alleged breach of duty is a crime and that, if not cleared up, may result in a I-A classification.

It is clear that on no view can the actions of Local Board No. 16 be held to have complied with the simple, straightforward notice requirement of the Regulations. *Appellant received a delinquency notice and a notice of reclassification on the same day. Both notices were mailed the same day (January 9, 1968).* The notice of delinquency required by the Regulations was deprived of any function whatsoever. How could petitioner clear up the matter which his local board, as SSS Form 304 required him to do lest he be reclassified I-A? How could he remove the delinquency after reasonable notice, as Regs. 1642.4(c) and 1642.10 contemplate?

The purpose of the procedure set out in the Regulations is apparent. Many seeming delinquencies may—

when brought to the attention of the registrant—be quickly cured, or may turn out not to exist. In such circumstances, the Regulations would be unreasonable—and perhaps even void—if a declaration of delinquency could be coupled with a simultaneous reclassification to I-A, with the consequent immediate exposure to an induction order which the Act (§ 12(h)(1)) and the Regulations (Reg. 1642.13) provide. If the consequences of a delinquency declaration were to be so immediate and so drastic, clearly some notice to the registrant before he was declared a delinquent would have to be (and would have been) afforded by the regulations. But the point is that the delinquency notice is exactly what the regulations call it—a "Notice"—and to function as such it must precede, by a reasonable period of time, the action of the local board.

Finally to be disposed of is any idea that the departure from proper procedure was a trivial one which could not have caused prejudice. This is not a case of giving adequate notice but departing slightly from the proper form—and in which there is actual notice anyway—as in *Atkins v. United States*, 204 F. 2d 269 (10th Cir.), cert. denied, 346 U.S. 818 (1953). Nor is this a case in which an order from a Local Board is proper in all respects except that it is signed by the clerk, whose authority to do so was not properly entered in the board's minutes, as was the case in *Smith v. United States*, 157 F. 2d 176, cert. denied, 329 U.S. 776 (1946). In such cases courts may treat the pro-

cedural default as *de minimis*. But in this case the critical procedural right to proper, timely and adequate notice was denied. As this Court has said of a similar procedural error,

> "This is not an incidental infringement of technical rights. Petitioner has been deprived of . . . a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." *Simmons v. United States,* 348 U.S. 397, 406 (1955)."

See also: *Wills v. United States,* 384 F. 2d 943 (9th Cir. 1967), *cert. denied,* 392 U.S. 908 (1968).

The crucial function of notice and a "pretermination hearing" is not a question peculiar to the law of selective service. In the field of welfare law as well, courts have been careful to hedge the termination of benefits upon which the recipient has relied in making his plans with the right to be heard. See, *e.g., Kelly v. Wyman,* 294 F. Supp. 893 (S.D.N.Y. 1968), *prob. juris* noted *sub nom. Goldberg v. Kelly,* 37 U.S.LW. 3399 (Apr. 21, 1969). No less attention should be given these rights when under consideration is whether the System may precipitously interrupt a registrant's studies at midyear (overriding apparently even his absolute statutory right to an I-S deferment under § 6(i)(2) of the Act.)

Conclusion.

For the foregoing reasons, it is respectfully prayed that the judgment of the court of appeals be reversed and the cause remanded to the district court with directions to hold a hearing to determine whether petitioner meets the qualifications for a statutory II-S deferment, and if so to enter judgment in his favor.

Respectfully submitted,*

EMANUEL MARGOLIS,
25 Bank Street,
Stamford, Connecticut,

LAWRENCE P. WEISMAN,
955 Main Street,
Bridgeport, Connecticut,

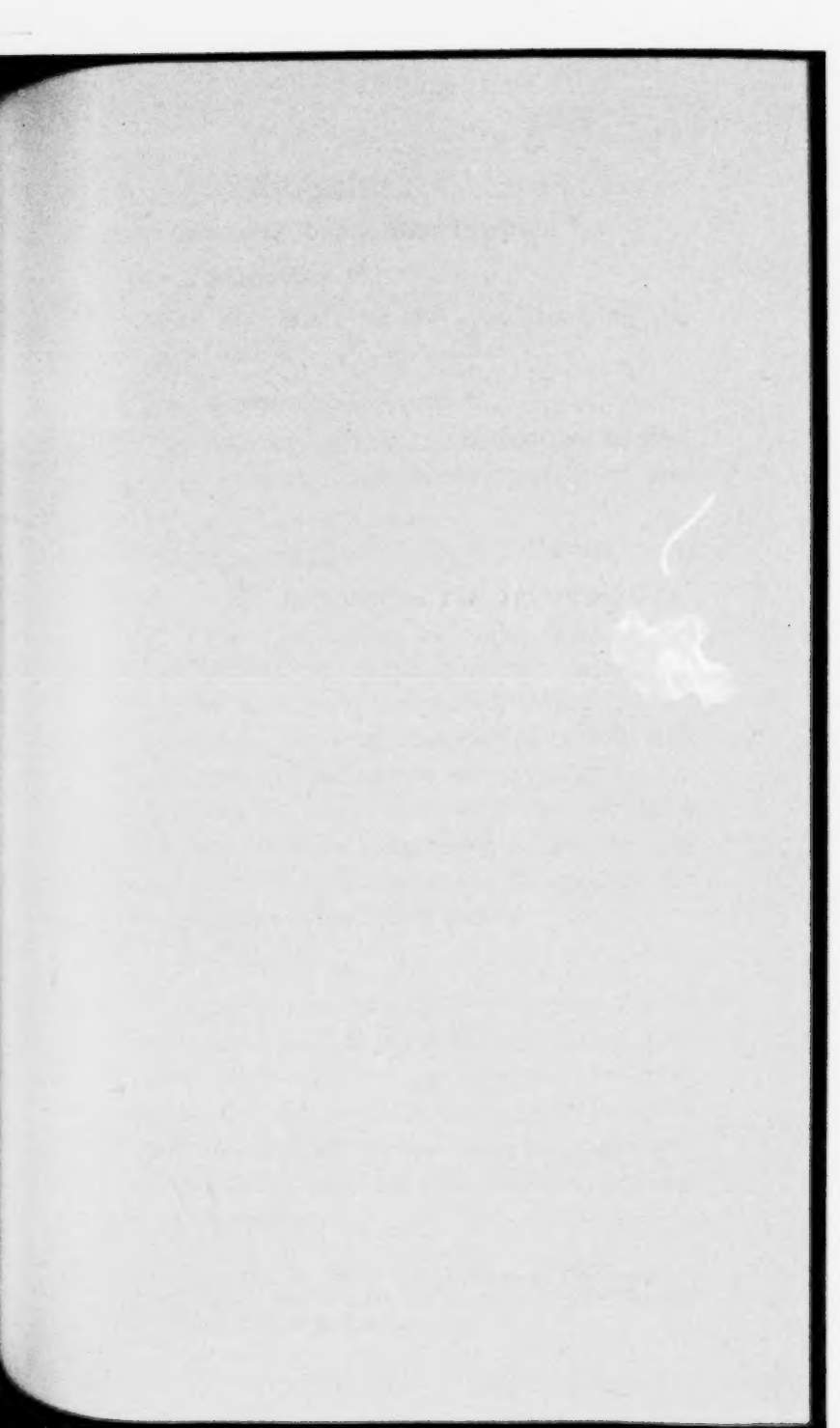
MICHAEL E. TIGAR,
School of Law,
University of California at
Los Angeles,
Los Angeles, Calif. 90024,

MELVIN L. WULF,
156 Fifth Avenue,
New York, New York 10010,

Attorneys for Petitioner.

---

*Counsel acknowledge the legal research and drafting assistance of Scott J. Tepper, third-year law student at the University of California at Los Angeles.



APPENDIX A.

Statutes and Regulations Involved.*

U.S. Const., amendment 1:

"Congress shall make no law . . . abridging the freedom of speech. . . ."

U.S. Const., amendment 5:

". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

U.S. Const., amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Military Selective Service Act of 1967, § 5(a)(1):

"The selection of persons for training and service under section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted."

---

*See also Appendix B, Brief for Petitioner, Gutknecht v. United States, No. 71, O.T. 1969, for a copy of the "Hershey directive" which is at issue in this case.

Military Selective Service Act of 1967, § 6(h)(1):

"Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminatd by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student

deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers."

Military Selective Service Act of 1967, § 10(b)(3):

". . . No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* that such review shall go to the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. . . ."

Military Selective Service Act of 1967, § 12(a):

". . . any person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made

pursuant to this title. . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

Military Selective Service Act of 1967, § 12(b):

"Any person . . . (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both."

32 C.F.R. § 1602.4 (1969):

"A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law."

32 C.F.R. § 1622.25 (1969):

§ *1622.25 Class II-S: Registrant deferred because of activity in study.*

(a) In Class II-S shall be placed any registrant who has requested such deferment and who is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning, such deferment to continue until such registrant completes the requirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first.

(b) In determining eligibility for deferment in Class II-S, a student's "academic year" shall include the 12-month period following the beginning of his course of study.

(c) A student shall be deemed to be "satisfactorily pursuing a full-time course of instruction" when, during his academic year, he has earned, as a minimum, credits toward his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the proportion which the number of academic years completed bears to the normal number of years established by the school to obtain such degree. For example, a student pursuing a four-year course should have earned 25% of the credits required for his baccalaureate degree at the end of his first academic year, 50% at the end of his second academic year, and 75% at the end of his third academic year.

(d) It shall be the registrant's duty to provide the local board each year with evidence that he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

32 C.F.R. §§ 1642.1-.15 (1969):

GENERAL

§ *1642.1 Regulations governing delinquents.*

Delinquents, as defined in § 1602.4 of this chapter shall be governed by the provisions of this part and such other provisions of the Selective Service Regulations as are not in conflict therewith.

§ *1642.2 Continuing duty.*

When it becomes the duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty.

§ *1642.3 Compliance with procedures of this part not condition precedent to prosecution.*

Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by the regulations in this part is not a condition precedent to the prosecution of any person under the provisions of section 12 of title I of the Military Selective Service Act of 1967.

§ *1642.4 Declaration of delinquency status and removal therefrom.*

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's

Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

CLASSIFICATION AND INDUCTION OF DELINQUENTS

§ *1642.10 Restriction on classification and induction of delinquents.*

No delinquent registrant shall be placed in Class I-A, Class I-A-O, or Class I-O under the provisions of section 1642.12 or shall be ordered to report for induction under the provisions of section 1642.13 or section 1631.7 of this chapter, or, in the case of conscientious objector opposed to noncombatant training and service, ordered to report for civilian work in lieu of induction, unless the local board has declared him to be a delinquent in accordance with the provisions of section 1642.4 and thereafter has not removed him from such delinquency status.

§ *1642.11 Registration and classification of unregistered delinquents.*

Whenever a person who is a delinquent because he has not registered reports or is brought before a local board, he shall be registered in the normal manner, except that if the local board with which he registers determines that because of his delay in registering he should be declared to be a delinquent under the provisions of section 1642.4 and processed for induction as a delinquent, the local board may enter in item 2 of the Registration Card (SSS Form No. 1) an address within its jurisdiction. If the local board makes such determination and retains jurisdiction of the registrant, it shall, as soon as possible after his registration, declare the registrant to be a delinquent and classify him as provided in section 1642.12.

§ *1642.12 Classification of delinquent registrant.*

Any delinquent registrant between the ages of 18 years and 6 months and 26 years and any delinquent registrant between the ages of 26 and 28 who was deferred under the provisions of section 6(c)(2)(A) of the Military Selective Service Act of 1967 which were in effect prior to September 3, 1963, and any delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was, or thereafter has been or may be, deferred under any other provision of section 6 of such Act, including the provisions of subsection (c)(2)(A) in effect on and after September 3, 1963, may be classified in or reclassified into Class I-A, Class I-A-O or Class I-O, whichever is applicable, regardless of other circumstances: *Provided,* That

a delinquent registrant who by reason of his service in the Armed Forces is eligible for classification into Class IV-A may not be classified or reclassified into Class I-A, Class I-A-O or Class I-O under this section unless such action is specifically authorized by the Director of Selective Service.

§ *1642.13 Certain delinquents to be ordered to report for induction.*

The local board shall order each delinquent registrant between the ages of 18 years and 6 months and 26 years and each delinquent registrant between the ages of 26 and 28 who was deferred under the provisions of section 6(c)(2)(A) of the Military Selective Service Act of 1967 which were in effect prior to September 3, 1963, and each delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was, or thereafter has been or may be, deferred under any other provisions of section 6 of such Act, including the provisions of subsection (c)(2)(A) in effect on and after September 3, 1963, who is classified in or reclassified into Class I-A or Class I-A-O to report for induction in the manner provided in section 1631.7 of this chapter, or in the case of a delinquent registrant classified or reclassified into Class I-O, the local board shall determine the type of civilian work it is appropriate for him to perform and shall order him to perform such civilian work in lieu of induction in accordance with the provisions of Part 1660 of this chapter, unless in either case (a) it has already issued such order, or (b) pursuant to a written request of the United States Attorney, the local board determines not to

order such registrant to report for induction or civilian work.

§ *1642.14 Personal appearance, reopening, and appeal.*

(a) When a delinquent registrant is classified in or reclassified into Class I-A, Class I-A-O, or Class I-O under the provisions of this part, a personal appearance may be requested and shall be granted under the same circumstances as in any other case

(b) The classification of a delinquent registrant who is classified in or reclassified into Class I-A, Class I-A-O or Class I-O under the provisions of this part may be reopened at any time before induction or before the date he is to report for civilian work in the discretion of the local board without regard to the restrictions against reopening prescribed in section 1625.2 of this chapter.

(c) When a delinquent registrant is classified in or reclassified into Class I-A, Class I-A-O or Class I-O under the provisions of this part, an appeal may be taken under the same circumstances and by the same persons as in any other case.

No. 1359-71

TIMOTHY J. SISSER,

Petitioner,

v.

SELECTIVE SERVICE LOCAL BOARD NO. 16, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

No. 1359-71

DAVID KARL GUTKNECHT,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

Gerson Egas.
Joshua B. Bonnon
Attorneys for
American Jewish Congress, Amicus Curiae
15 East 84th Street
New York, New York 10028

Leo Waldman
Of Counsel

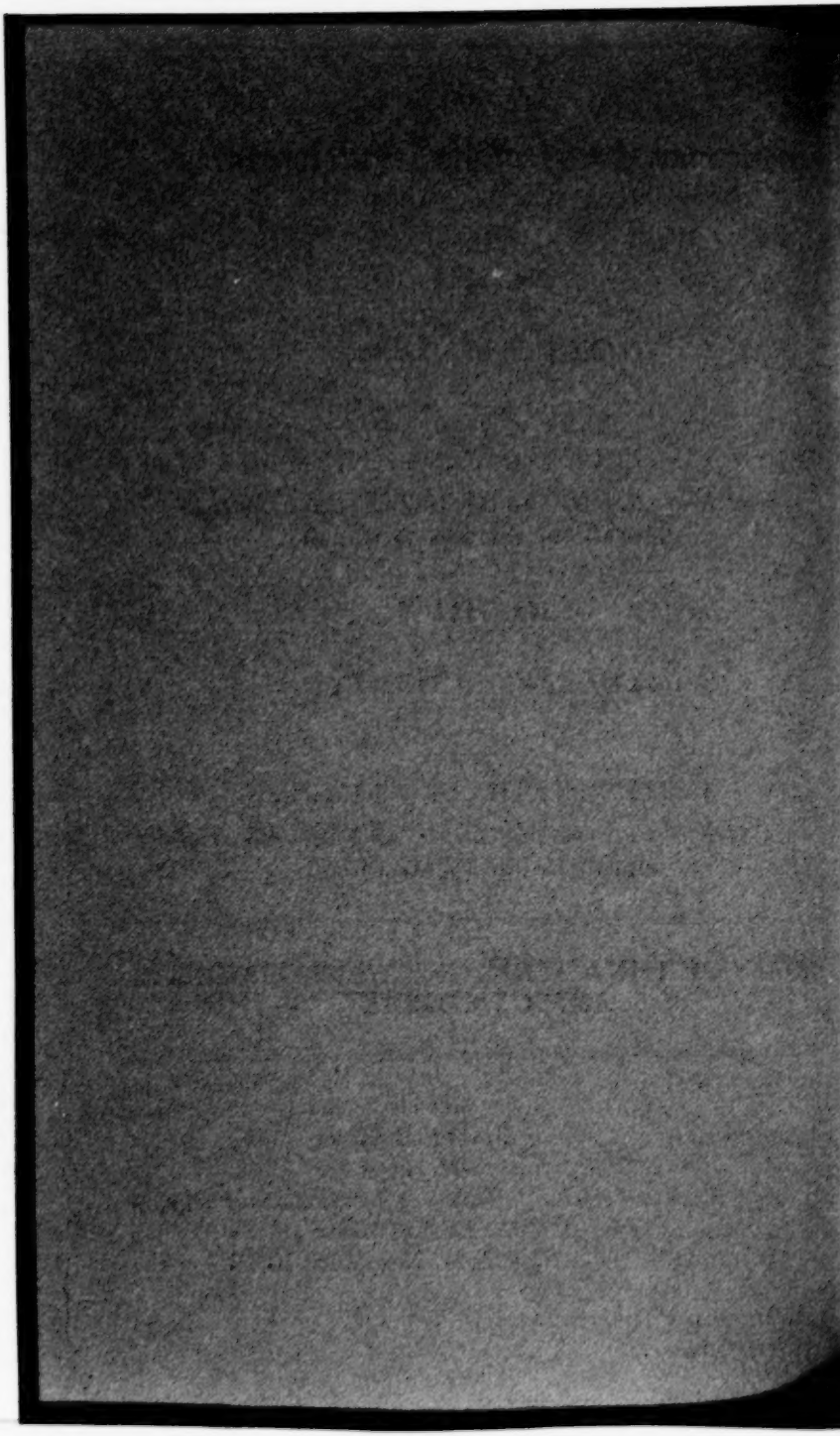


TABLE OF CONTENTS

	PAGE
INTEREST OF THE *Amicus*	2
PRELIMINARY STATEMENT	2
QUESTIONS PRESENTED	4
SUMMARY OF ARGUMENT	5
ARGUMENT	
POINT I—A Selective Service system under which local boards are endowed with unlimited discretionary power to reclassify registrants or to accelerate call-up on the basis of "delinquency," which contains no standards or guidelines as to when that power is to be exercised, imposes a constitutionally forbidden inhibition on exercise of freedom of expression as guaranteed by the First Amendment	7
A. The Lack of Standards in the Delinquency Procedures	9
B. The Impact on Freedom of Expression	11
C. The Hershey Letter	13
D. The Action of the Local Boards	15
POINT II—The regulations which give local boards unfettered discretion to act against selected registrants fail to afford the registrants procedural protections guaranteed by the Fifth and Sixth Amendments	18

PAGE

POINT III—The vesting in local draft boards of uncontrolled discretion to select among registrants who have violated the Selective Service law or regulations those on whom "delinquency" sanctions are to be imposed presents such opportunities for the operation of discrimination on racial, religious or other impermissible grounds as to constitute a violation of the Due Process Clause of the Fifth Amendment 21

CONCLUSION 26

TABLE OF AUTHORITIES

Cases:

Ashton v. Kentucky, 384 U. S. 195 (1966) 18

Bartchy v. United States, 319 U. S. 484 (1943) 10
Bolling v. Sharpe, 347 U. S. 497 (1954) 22

Cox v. Louisiana, 379 U. S. 536 (1965) 11

Dombrowski v. Pfister, 380 U. S. 479 (1965) 7

Hague v. C. I. O., 307 U. S. 496 (1939) 12

Kennedy v. Mendoza-Martinez, 372 U. S. 144 (1963) 21
Kunz v. New York, 340 U. S. 290 (1951) 25

Louisiana v. United States, 380 U. S. 145 (1965) 23, 24, 25
Lovell v. Griffin, 303 U. S. 444 (1938) 11

Morissette v. United States, 342 U. S. 246 (1952) 10

PAGE

NAACP v. Button, 371 U. S. 415 (1963) 11, 12
New York Times v. Sullivan, 376 U. S. 254 (1964) 8
Niemotko v. Maryland, 340 U. S. 268 (1951) 11, 23

Oestereich v. Selective Service Local Board No. 11, 393 U. S. 233 (1968) 12, 13, 15, 17, 20, 21

P. S. Royster Guano Co. v. Virginia, 253 U. S. 412 (1920) 22

Saia v. New York, 334 U. S. 558 (1948) 12, 25
Schneider v. New Jersey, 308 U. S. 147 (1939) 11, 22
Schneider v. Rusk, 377 U. S. 163 (1964) 22
Shapiro v. Thompson, 89 S. Ct. 1322 (1969) 22
Skinner v. Oklahoma, 316 U. S. 535 (1942) 22
Smith v. Texas, 311 U. S. 128 (1940) 23, 24, 25
Speiser v. Randall, 357 U. S. 513 (1958) 8
Staub v. Baxley, 355 U. S. 313 (1958) 12
Stromberg v. California, 283 U. S. 359 (1931) 11

Thomas v. Collins, 323 U. S. 516 (1945) 11
Thornhill v. Alabama, 310 U. S. 88 (1940) 11

United States v. Jackson, 390 U. S. 570 (1968) 9

Yick Wo v. Hopkins, 118 U. S. 356 (1886) 22

Other Authorities:

Griffiths, J., "Punitive Reclassification of Registrants Who Turn in Their Draft Cards," 1 SSLR 4001 9

National Advisory Commission on Selective Service, Report, "In Pursuant of Equity, Who Serves When Not All Serve" (1967), p. 19 22

IN THE

Supreme Court of the United States

October Term, 1969

No. 1144

TIMOTHY J. BREEN,

Petitioner,

v.

SELECTIVE SERVICE LOCAL BOARD NO. 16, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

No. 1176

DAVID EARL GUTKNECHT,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

This brief is being filed with the consent of the parties.

Interest of the *Amicus*

The American Jewish Congress is a national organization of American Jews, founded more than 50 years ago to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are especially committed to the preservation of the great freedoms secured by the First Amendment in the conviction that only by maintenance of an open society with opportunities for free expression can we improve and protect our democracy.

Among the freedoms we prize most highly is the right of citizens of this nation to express peaceful public dissent from the policies of our government without exposure to penalty or reprisal of any sort. We are concerned about the treatment of "delinquents" under the Selective Service system, as presently administered, not only because it poses grave questions of abuse of statutory authority and denial of Fifth and Sixth Amendment rights, but most particularly because of its pervasive threat to the free exercise of First Amendment rights by millions of young Americans of draft age. It is to these constitutional issues that this brief is directed.

Preliminary Statement

Both cases present the issue of the validity of the Selective Service "delinquency procedures." Under these procedures, a registrant failing to perform any duty required of him under the provisions of the Selective Service Law or Regulations other than the duty to comply with an in-

duction or equivalent civilian work order may be declared delinquent by his local draft board (32 C.F.R., Secs. 1602.4, 1642.4(a) (1967)). Once having declared a registrant delinquent, a local board may proceed to reclassify the registrant into Class I-A (32 C.F.R., Sec. 1642.12 (1967)). Having done so, the board must order him to report for induction before all others, even before volunteers (32 C.F.R., Secs. 1642.13, 1631.7 (1967)). Local boards are also empowered to remove registrants from delinquency status (32 C.F.R., Sec. 1642.4(c)).

In *Breen* (No. 1144), the petitioner, a full-time undergraduate student, had been deferred from training and service under Section 6(h)(1) of the Military Selective Service Act of 1967, 50 App. U.S.C., Sec. 456(h)(1). However, he was declared delinquent, stripped of his deferment, reclassified I-A and ordered to report for induction after he returned his Selective Service Registration Certificate to the government as a statement of protest against the Vietnam war. Petitioner brought suit seeking a judgment that the declaration of his delinquency was null and void and an injunction against his induction into the armed forces. The District Court held that it was deprived of jurisdiction by Section 10(b)(3) of the 1967 Act (50 App. U.S.C., Sec. 460(b)(3)). The Court of Appeals, though noting its belief that petitioner had asserted substantial constitutional claims, affirmed on the jurisdictional ground.

In *Gutknecht* (No. 1176), petitioner had participated in a "Stop the Draft Week" protest in Minneapolis and had left his Registration Certificate and Notice of Classification I-A on the steps of the Federal Building in that city. These

were sent to the Minnesota Director of Selective Service. Subsequently, petitioner was declared "delinquent" for failing to have his Registration Certificate and Notice of Classification in his possession. Five days later his induction date was advanced pursuant to C.F.R. 1631.7. He was indicted for failure to report for and submit to induction in violation of the Selective Service Act (50 App. U.S.C., Sec. 462). After trial without jury, he was found guilty and sentenced to four years imprisonment. His conviction was affirmed by the Court of Appeals for the Eighth Circuit, which concluded that his accelerated induction as a delinquent was not "lawless or irregular."

Questions Presented

This brief is addressed solely to the question whether the provisions of the Selective Service regulations which give local boards power to reclassify draft registrants and call them up for immediate induction if they fail to perform any duty imposed upon them by the Selective Service Act or the regulations issued thereunder, without providing standards or guidelines as to how that power is to be exercised:

1. Impose a constitutionally forbidden prohibition on exercise of freedom of expression as guaranteed by the First Amendment;

2. Deny procedural rights guaranteed by the Fifth and Sixth Amendments; and

3. Present such opportunities for the operation of discrimination on racial, religious or other impermissible grounds as to constitute a violation of the Due Process Clause of the Fifth Amendment.

Summary of Argument

I. A Selective Service system under which local boards are endowed with unlimited discretionary power to reclassify registrants or to accelerate their call-up on the basis of "delinquency," without providing guidelines or standards as to when that power is to be exercised, imposes a constitutionally forbidden inhibition on exercise of freedom of expression as guaranteed by the First Amendment.

A. There are no statutory provisions governing the operations of the delinquency procedure. The applicable regulations provide that local boards "may" impose the sanctions of reclassification and immediate induction on any delinquent, that is, any person failing to perform a duty connected with the draft. Thus, the boards are free to select arbitrarily those delinquents on whom sanctions are to be imposed.

B. Such broad discretion invites discriminatory application of sanctions against persons expressing unpopular views. The vagueness of the regulations which creates this opportunity is sufficient to invalidate them on their face.

C. In this case, however, there is evidence of discriminatory application. In a letter to local draft board members, the Director of the Selective Service system has encouraged them to apply the delinquency procedures selectively in the case of violations growing out of "demonstrations."

D. The Government's argument that application of the delinquency procedure can only be challenged on the basis

of evidence of discriminatory application by the specific local board in each specific case would place an intolerable and constitutionally impermissible burden on registrants subject to delinquency sanctions. The vice of the present system is that it permits undetectable manipulation of the Selective Service system and the consequence of this is a restrictive effect on freedom of expression on the part of all registrants.

II. The regulations fail to afford the registrants procedural protections guaranteed by the Fifth and Sixth Amendments. The Government's argument that those guarantees do not apply because reclassification and accelerated induction are not "punishment" is unsound. The sole purpose and effect of the delinquency procedures is to deter violation of the Selective Service regulations—the classic purpose of punishment.

III. The vesting in local draft boards of uncontrolled discretion to select among "delinquent" registrants those on whom sanctions are to be imposed presents such opportunities for the operation of discrimination on racial, religious or other impermissible grounds as to constitute a violation of the Due Process Clause of the Fifth Amendment. Inherent in any such system is the danger that it will be administered discriminatorily, in violation of the concept of equal protection of the law which is included in the guarantee of due process.

The delinquency procedures invite discrimination not only on the basis of unpopular views, as argued in Point I, but also on the basis of racial, religious and other prejudice.

It is not necessary to prove discrimination in each case. It is the fact that, because of the absence of standards, discrimination can be practiced without detection or effective judicial supervision that renders the regulations invalid.

ARGUMENT

POINT I

A Selective Service system under which local boards are endowed with unlimited discretionary power to reclassify registrants or to accelerate call-up on the basis of "delinquency," which contains no standards or guidelines as to when that power is to be exercised, imposes a constitutionally forbidden inhibition on exercise of freedom of expression as guaranteed by the First Amendment.

It is one of the lessons of history that an individual's vulnerability to official vendettas is directly dependent upon the breadth of administrative discretion and the availability of procedural safeguards. Obviously, a system which permits selective, arbitrary imposition of penalties without standards, guidelines or safeguards, acts as a Sword of Damocles over those whose political or social views do not conform to the prevailing norms. In the currently popular, but accurately descriptive, constitutional lexicon, such a system imposes an unconstitutional "chilling effect" upon the espousal of unpopular views protected under the free speech guarantees of the First Amendment. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 487 (1965).

This is precisely the vice of the selective service "delinquency" procedures, both on the face of the statute[1] and regulation and as construed and applied in the instant cases. Whether or not reclassification and accelerated inductions are held to constitute "punishment" as such,[2] within the meaning of the Fifth and Sixth Amendments, the breadth of discretion vested in local selective service boards—unfettered by guidelines, definitions, or procedural requirements—is such as to create a constitutionally impermissible threat that protected activity on the part of registrants will trigger the imposition of "delinquency"

1. It should be noted that the Selective Service Act contains only the barest reference to the whole subject of "delinquency." Prior to 1967, it contained no provisions on the subject. In the revision of the Selective Service Act adopted in 1967, the term "delinquents" appeared for the first and only time in Section 456(h)(1), the last sentence of which reads as follows:

> As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Petitioners contend, *inter alia*, that there is no statutory basis for the delinquency regulations. The Government argues, however, that this passing reference to "delinquents" in Section 456(h)(1) provides the necessary basis. This brief is not addressed to that issue. We comment on it only because it strikingly reveals the absence of standards or guidelines of any kind in the controlling statute.

2. It is important to note that the government's argument that the delinquency procedures do not impose "punishment" is relevant to the point next discussed, whether the delinquency procedures violate Fifth and Sixth Amendment guarantees, but it is not relevant to the issue of freedom of expression discussed in this point. If governmental action has a deterrent effect on free expression, its constitutionality is not affected by whether it takes the form of punishment.

Thus, in *Speiser* v. *Randall*, 357 U. S. 513 (1958), a denial of exemption from taxes was treated as placing an unconstitutional restraint on expression. If withholding of exemption from military service is not punishment, neither is withholding of exemption from taxes. Again, in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), this Court found an impermissible restraint on free expression in the operation of a state's civil libel laws, hardly a form of punishment.

sanctions. Such a threat, unnecessary to the achievement of legitimate governmental aims under a properly drawn statute and regulations, cannot help but cast the forbidden "chill." *United States* v. *Jackson*, 390 U. S. 570, 582 (1968).

This danger, it should be noted, applies not only to protests against the Vietnam war but to any expression of views which are unpopular generally or out of favor with particular local boards.

A. The Lack of Standards in the Delinquency Procedures

Since, as we have noted, the governing statutes contain only a passing reference to delinquency, it is obvious that they neither define the term nor supply any standards for the delinquency procedures created by the regulations. The regulations themselves do not supply this omission. They permit a local board to declare a registrant delinquent "whenever a registrant has failed to perform any duty or duties required of him under the Selective Service Law other than the duty to comply with an Order to Report for Induction or the duty to comply with an Order to Report for Civilian Work and Statement of Employer." Thus, presumably local boards are free to, but need not, apply the concept to any violation, however technical, minor or immaterial.[3] Nor does the delinquency regulation provide

3. It has been pointed out that "delinquency" status and consequent punishment can be imposed both on the registrant who returns his Classification Questionnaire on the 11th instead of the 10th day after it was mailed and on the registrant who seeks to evade services by not informing his local board of his whereabouts, or of the termination of the basis for his deferred status (e.g., that his wife's pregnancy entitling him to III-A ended in miscarriage). Griffiths, J., "Punitive Reclassification of Registrants Who Turn in Their Draft Cards," 1 SSLR 4001, 4008 n. 61.

guidance as to the necessity of scienter or willfulness. *Morissette* v. *United States*, 342 U. S. 246 (1952); compare C.F.R. Sec. 1642.4 with Sec. 12(a) of the Act (50 App. U.S.C., Sec. 462(a)) and *Bartchy* v. *United States*, 319 U. S. 484 (1943).

The concept of "delinquency," with its life or death consequences, extends not only to violations of the statute but also to violations of the regulations, which impose requirements upon registrants nowhere found in the statute itself. Congress, under the Government's construction of the delinquency procedure, has not only given local boards total power to construe and apply the delinquency procedures but has also empowered the Selective Service System to promulgate the standards and requirements, violations of which may prompt local boards to impose delinquency sanctions.

Perhaps most important, local boards "may," or may not, choose to visit delinquency sanctions upon violators and may, or may not, remove the violator from delinquency status "at any time," all without any standards or guidelines. This unbridled discretion means not only that some boards may choose to embrace a far broader concept of what constitutes actionable delinquency than others, but that the same board may choose to reclassify and accelerate induction in the case of some delinquents and overlook identical conduct on the part of others.

The opportunity for discriminatory enforcement arises in part from the nature of the local boards and the job they perform. The task of choosing the relatively small number of draftees from among the more than two million young

men reaching draft age each year is vested by the Selective Service system in some 4,000 local draft boards. The possibility that such boards, in the absence of clear legislative standards, will seek to enforce their own political, social and other prejudices through the mechanism of the delinquency procedures cannot be discounted. It is just this kind of opportunity, afforded by vague, overbroad statutes, for the operation of the "whims or personal opinions of a local governing body" that has consistently led this Court to hold such statutes unconstitutional. *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951).

B. The Impact on Freedom of Expression

This Court has repeatedly held that restrictions upon conduct closely touching the exercise of First Amendment rights must be narrowly drawn so as to hit precisely the constitutionally regulable aspects of conduct without permitting impingement upon protected free expression. *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Stromberg* v. *California*, 283 U.S. 359 (1931).

The vesting of unbridled discretion in public officials to grant or deny permission for the exercise of rights of free speech and assembly, in the absence of properly drawn standards calculated to prevent selective, arbitrary administration and to assure uniform application free from improper considerations, has been held unconstitutional as a "pervasive restraint on freedom of discussion" and a "device for the suppression of ideas." *Cox* v. *Louisiana*, 379 U.S. 536, 557 (1965); *Schneider* v. *New Jersey*, 308 U.S. 147 (1939); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Hague* v.

C.I.O., 307 U.S. 496 (1939); *Saia* v. *New York*, 334 U.S. 558 (1948); *Staub* v. *Baxley*, 355 U.S. 313 (1958). The delinquency procedures fail by a wide measure to satisfy the standards of limited discretion exercised within reasonable guidelines as required by these decisions.

It cannot be argued that the thrust of these decisions is limited to laws dealing directly and explicitly with forms of expression, such as leaflets and sound trucks. Any statute or regulation that gives officials discretionary powers defined so broadly that they can be used whimsically is a threat to freedom of expression. As this Court said in *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), "* * * a vague and broad statute lends itself to selective enforcement against unpopular causes."

That consideration was stressed by this Court in *Oestereich* v. *Selective Service Local Board No. 11*, 393 U.S. 233 (1968), in which it barred denial of a statutory exemption from military service on the ground of "delinquency." It said (at 237):

> Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

Whatever may be the merits of the distinction between exemption and deferment as it affects the timing of judicial review or other technical aspects of Selective Service administration, it is clear that, in the terms of the concern expressed in the above-quoted portion of *Oestereich*, the distinction is irrelevant.[4] For the threat that boards, unencumbered by Congressionally prescribed standards, will become "free-wheeling agencies meting our their brand of justice in a vindictive manner" applies as much to deferments and the order of call-up as to exemptions. The danger inheres in the application of delinquency procedures under this statutory and regulatory scheme to any potential inductee, regardless of status. And the effect of such a scheme, as a deterrent to the expression of unpopular views by draft eligibles, is inescapable.

C. The Hershey Letter

We submit that the vagueness of the regulatory scheme and the resultant opportunity for its abuse to restrain protest is enough to condemn it on its face. But here there is more. There is persuasive evidence that the Selective Service system is in fact making use of that opportunity.

It is in this connection that the letter and memorandum sent by General Hershey on October 26, 1967, to all members of the Selective Service system must be considered, for it is a very real fact of Selective Service life. General Hershey is the director of the system, his directive was

4. If anything, there is greater danger of abuse in the case of delinquency procedures affecting classification and induction where there are no guiding standards. Such standards do exist in the case of statutory exemptions. See, for example, the carefully drawn provisions governing exemptions of ministers and students, 50 App. U.S.C., Secs. 456(g) and 456(h)(1).

sent to all boards, it remains unrevoked, and there is evidence in the cases before this Court that it has been acted upon. General Hershey clearly invited local boards to predicate invocation of the delinquency regulations on factors which cannot help but still the voice of protest, and were undoubtedly designed to have precisely that effect.

The letter begins by stating that "deferments are given only when they serve the national interest" and that violation of the Act or regulations "cannot be in the national interest." It then states that those who engage in such violations "should be denied deferment in the national interest."

Two things should be noted at this point. First, this broadly stated policy was laid down by General Hershey, not Congress. Congress has nowhere stated that delinquents should be denied deferment. It has not made any such determination of what General Hershey calls the "national interest."

Second, although the policy is broadly stated ("those who violate them should be denied deferment"), it is obviously not to be broadly applied, in the sense that every violator is to be denied deferment. As is made clear later in the letter, the boards "may" act on the basis of violations but they are not required to do so.

In what cases are they to act? The answer is supplied by the fact that the letter as a whole is addressed to the problem of "demonstrations" and those who engage in them. Granting that it applies only to those who engage in illegal activity, it makes it clear that its concern is with

those who engage in a particular class of illegal activity—those who act under the influence of "misdirected emotions" or "vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens."

What is a draft board member to make of this? He certainly knows that the classic way of condemning opponents of any war a nation may be engaged in—a condemnation freely used during the present conflict in Vietnam—is to describe them as destroying our unity and endangering our freedoms.

The plain import of the letter, then, is that the regulations here involved, which obviously cannot be used against all violators, are to be used against those violators who endanger national "unity."

If this principle were embodied in a formal regulation, its unconstitutionality would be obvious. The vice of the present statute and regulations is that, because of their vagueness, they permit it to be put into effect without being spelled out.

D. The Action of the Local Boards

In its brief in *Oestereich* (Government brief p. 54), the government conceded its doubts as to the validity of the delinquency procedures, particularly in light of the breadth of "unfettered discretion" apparently conferred upon local boards. However, in its brief opposing the grant of certiorari in *Gutknecht* (p. 8), the government attempted to explain away this concession by attributing the con-

stitutional doubts there expressed to the likelihood that Oestereich's local board, "upon the invitation of General Hershey's letter and memorandum discussed above, [did] trigger the operation of the delinquency regulations because of Oestereich's participation in a political protest against the government's involvement in Vietnam."

It is thus apparently the government's position that, if the political stance of a registrant triggers the invoking of delinquency procedures under the board's statutorily "unfettered discretion," then there is a serious constitutional question. Absent such a showing, however, the government urges that no issue of validity arises.

This argument would make each case turn upon the state of mind of each local board in invoking the "delinquency" regulations against each registrant. Unless the registrant could prove that his local board, in exercising its statutorily unfettered discretion in his case, was motivated by General Hershey's letter and memorandum, or by the approach manifested therein whether or not stemming from that source, his challenge would fail.

The government's position, we submit, would place on the registrant an intolerable and constitutionally impermissible burden. Any system which permits and indeed encourages thousands of lay, nonexpert boards to predicate life-or-death consequences upon the exercise of First Amendment rights, and permits redress only upon proof of the board's state of mind, so discourages and impedes the espousal of unpopular views that it cannot be permitted to stand. Particularly is this so when it is recalled, as we

note in Point II below, that the registrant does not enjoy the procedural protections afforded in a judicial trial and required by the Fifth and Sixth Amendments, and a victim of accelerated call-up, such as Gutknecht, receives no administrative hearing at all.

The problem is graphically demonstrated in the instant cases. In *Breen*, as in *Oestereich*, the registrant alleged board reliance upon General Hershey's directive and, in the procedural posture of the case, the truth of the allegation must be assumed. In *Gutknecht*, on the other hand, the trial court found that this directive was not a motivating factor. Yet the registrants' conduct was identical in the two cases.

Were the government's position to be adopted by this Court and thus to become generally known, it would be a simple matter for local boards to mask their hostility to registrants' political or social views and to assert that their application of delinquency procedures to particular youths was unrelated to any expression of such views. Conversely, it would become all but impossible for a registrant to sustain the burden of probing into his board's mental state and ferreting out the forbidden motive.

In sum, the vice lies in the looseness and imprecision of the statutory and regulatory scheme, the breadth of the discretion purportedly given to local boards, and the lack of standards, guidelines and procedural safeguards. Such a scheme permits undetectable manipulation of vital Selective Service classifications and priorities based on constitutionally impermissible criteria; and the consequence of

this is such a "chilling effect" upon the free speech of the youth of our nation that the scheme which allows and encourages it must itself be branded as invalid. As this Court said recently in *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966):

> Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.

POINT II

The regulations which give local boards unfettered discretion to act against selected registrants fail to afford the registrants procedural protections guaranteed by the Fifth and Sixth Amendments.

The procedures followed under the delinquency regulations make no pretense of complying with the requirements of the Fifth and Sixth Amendments, such as confrontation, compulsory process for obtaining witnesses and the right to counsel. The government's principal justification for this is that the procedures do not impose punishment. We submit that this argument is disingenuous in the extreme. The regulations impose punishment both realistically and in the constitutional sense.

The delinquency procedures accelerate the induction of registrants characterized as "delinquents" primarily by depriving them of "exemptions" or "deferments" to which they are otherwise entitled, because of some wrongdoing

on their part. There is no nexus or connection between the act of wrongdoing and the sanction imposed; the nature of the violation does not establish any relational or functional ineligibility for the classification of which the registrant is deprived. The act of turning in a draft card, for example, does not indicate that the registrant is any less a student, conscientious objector or employee in essential industry. Nor does it mean that he will be a more effective soldier and, therefore, a fit subject for early induction. Under the Selective Service scheme, the ultimate sanction of loss of classification status and accelerated induction may follow upon any delinquency irrespective of its nature or seriousness.

The government's argument that this obviously punitive scheme benefits both the registrant and the Selective Service system is wholly unpersuasive. Essentially the contention is that reclassification and accelerated induction are a lesser sanction to the registrant than immediate criminal prosecution. Even the assumption is debatable—obviously registrants who have risked criminal prosecution to avoid what they regard as immoral military service do not agree with it. Moreover, in view of the broad criminal sweep of Section 12(a) of the Selective Service Act, a registrant who violates some duty under the Act or regulation other than submitting to induction, appears to remain subject to criminal penalties even if he is actually drafted under the delinquency procedures. But, most important, the whole argument is irrelevant. In any system of laws there may be greater or lesser degrees of punishment. That does not mean that the lesser punishment is not, nevertheless, punishment.

Equally specious is the government's argument that military service is a duty of citizenship and thus cannot be regarded as a punitive sanction. This claim cannot be reconciled with the government's own concession in its *Oestereich* brief (p. 52) that "It is difficult to conclude that these statements [by General Hershey] did not in effect invite local Boards to utilize delinquency reclassification in a punitive fashion." The government there correctly acknowledged that accelerated involuntary induction into military service can be the culmination of a "punitive" process. For it is not the nature of the victim's ultimate fate which alone determines whether punishment has been imposed; what may indeed be deemed a duty of citizenship in other contexts can well be the result of a punitive process if, as here, the elements of punishment are present.

Certainly, in assessing the nature of the delinquency procedures, it can hardly be claimed that the consequences visited upon "delinquents" represent an honor or privilege reserved only for this favored group. Obviously, these are sanctions or penalties designed to deprive men of a draft classification or status deemed precious and desirable not only by the registrants themselves but also by those responsible for the formulation and administration of the Selective Service system.

Finally, the invocation of delinquency procedures is not beneficial to the Selective Service system except in one particular sense. As indicated above, there can be no serious claim that delinquents make better soldiers than nondelinquents. What the government really has in mind, but understandably fails to articulate, is that the delinquency regulations, by visiting serious consequences upon

delinquents, discourage young men from violating the Selective Service laws; and this, it may well be urged, is advantageous to the system.

The difficulty with this argument, however, is that it is merely another way of stating the classic deterrence objective of any punishment. And since a deterrence objective is one of the indicia of punishment (*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)), to the extent that the government's argument has any factual basis, it merely serves to confirm the conclusion that draft delinquents must be afforded the vital constitutional protections which the delinquency procedures deny to them.

POINT III

The vesting in local draft boards of uncontrolled discretion to select among registrants who have violated the Selective Service law or regulations those on whom "delinquency" sanctions are to be imposed presents such opportunities for the operation of discrimination on racial, religious or other impermissible grounds as to constitute a violation of the Due Process Clause of the Fifth Amendment.

The possibilities for discriminatory application of the "delinquency procedures" were pointed out by this Court only recently. In *Oestereich, supra* (393 U. S. at 416), Justice Douglas noted that these procedures could be used to induct a registrant in order "* * * (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board member might be better served."

The likelihood of discrimination is strongly suggested by the unrepresentative nature of the local boards. As of 1967, board members were almost exclusively white, their average age was 58 with one-fifth over seventy years of age, and eighty percent had white collar occupations.[5]

The unrepresentative nature of the boards, combined with the fact that only a small proportion of draft eligibles are actually selected for induction, we submit, makes it impossible for the current delinquency procedures to operate in conformity with the requirements of equal protection and due process as embodied in the Due Process Clause of the Fifth Amendment.[6]

Statutes and administrative regulations which create discrimination without a basis rationally connected with a constitutionally permissible purpose have long been held invalid under the concept of equal protection. *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942). The same principle applies if the law, although fair on its face, is indeed administered discriminatorily. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

Inherent in any system which grants to governmental agencies unfettered discrimination to base their decisions regarding individuals on political discrimination, racial or

5. "In Pursuant of Equity, Who Serves When Not All Serve," Report of the National Advisory Commission on Selective Service (1967), p. 19.

6. Although the Fifth Amendment contains no "equal protection" clause, its guarantee of due process has been interpreted to prohibit "unjustifiable discrimination." *Shapiro* v. *Thompson*, 89 S. Ct. 1322 (1969); *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

religious prejudice or personal animus is the danger and indeed the likelihood that it will be administered discriminatorily, in violation of equal protection of the laws. *Niemotko* v. *Maryland*, 340 U. S. 268, 271 (1951), and cases there cited. Thus, in *Smith* v. *Texas*, 311 U. S. 128, 130, 131 (1940), this Court, passing on a claim of racial discrimination in selecting a jury, said:

> Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable.

Similarly, in *Louisiana* v. *United States*, 380 U. S. 145 (1965), this Court struck down a statutory scheme relating to voting which vested undue opportunity for discrimination in local registrars. Said the Court (p. 150):

> The interpretation test, the court [below] found, vested in the voting registrars a virtually uncontrolled discretion as to who should vote and who should not. Under the State's statutes and constitutional provisions, the registrars, without any objective standard to guide them, determine the manner in which the interpretation test is to be given, whether it is to be oral or written, the length and complexity of the sections of the State or Federal Constitution to be understood and interpreted, and what interpretation is to be considered correct. There was ample evidence to support the District Court's finding that registrars in the 21 parishes where the test was found to have been used had exercised their broad powers to deprive otherwise qualified Negro citizens of their right to vote; and that the existence of the test as a hurdle to voter

qualification has in itself deterred and will continue to deter Negroes from attempting to register in Louisiana.

In the cases at bar, the existence of unfeterred discretion in local draft boards to invoke "delinquency" procedures without reference to standards or guidelines of any sort, serves not only as an impediment to the exercise of First Amendent rights, as we have argued in Point I, but as a constant invitation to the operation of racial, religious and other prejudice. The vice is compounded, moreover, by the inability of registrants to secure meaningful judicial review. For effective judicial supervision, in the nature of the case, depends upon articulated standards and criteria against which the administrative conduct and decisions can be measured; and the broader the administrative discretion, the more illusory the review. Where a statutory or administrative scheme presents such opportunities and temptations for discriminatory enforcement—and where as here the likelihood of proving the operation of prejudice in any particular case is slight—the entire scheme should be struck down without the necessity of establishing the operation of impermissible discrimination in any individual case.

It may be argued that in many of the cases cited above, for example, *Smith* v. *Texas* and *Louisiana* v. *United States*, there was evidence that discrimination had in fact occurred. We believe there is similar evidence of discrimination here. The Hershey letter referred to above plainly establishes a policy for local draft boards that the delinquency regulations, technically applicable to all violators, are to be invoked selectively in the case of those who engage in "dem-

onstrations" or who are motivated by a desire to undermine national "unity."

However, we submit that such proof of discrimination is not necessary. The essence of the principle that public officials may not be given unlimited power to make decisions affecting the rights of individuals is the potentiality of abuse, not its actuality in each case. Thus, in the *Smith* and *Louisiana* cases, *supra*, the discrimination was referred to as evidence for the wisdom of the rule barring unregulated official power. This Court's decision in the *Louisiana* case is plainly posited on the absence of standards rather than on evidence of discrimination.

A parallel may be drawn with the cases invalidating ordinances that give police officials unlimited power to permit various forms of expression. Thus, in *Saia* v. *New York*, 334 U.S. 558 (1948), this Court invalidated an ordinance giving local officials unlimited power to permit or prohibit the use of sound trucks. Recognizing that the state may properly protect its citizens against noise resulting from the unregulated use of these devices, the Court struck down the ordinance because the Chief of Police could grant or deny permits on any basis he chose. The Court said (at 562):

> In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying.[7]

7. Similarly, in *Kunz* v. *New York*, 340 U. S. 290 (1951), this Court held that an ordinance barring public worship meetings unless a permit had been obtained was unconstitutional because no standards were supplied for the granting or withholding of the permit. This result was reached not because the denial of the permit in question was discriminatory but because, under the ordinance, it could have been.

It is thus apparent that it was the opportunity for, not the actuality of, discrimination based on political or religious belief that required invalidation of the regulation. So here, the opportunity for discriminatory application of the delinquency regulations is enough to require their invalidation.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decisions of the Courts of Appeals in these two cases should be reversed.

Respectfully submitted,

GEORGE SOLL
JOSEPH B. ROBISON
Attorneys for
American Jewish Congress, Amicus Curiae

LOIS WALDMAN
Of Counsel

July, 1969

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statutes and regulations involved	2
Statement	2
Summary of argument	4
Argument	5
I. Section 10(b)(3) of the Military Selective Service Act of 1967 was properly applied by the courts below to prohibit the pre-induction judicial review of petitioner's delinquency reclassification from II-S to I-A	5
A. The background and history of Section 10(b)(3) confirms that a prohibition against pre-induction judicial review is essential to avoid litigious interruptions of the nation's program for procurement of personnel for military service	5
B. The enactment of amended Section 10(b)(3), in 1967, underscores congressional insistence that the prohibition of pre-induction judicial review is a necessary deterrent to litigious interruptions of the classification and induction process	11

366-432—69——1

Argument—Continued
I. Section 10(b)(3)—Continued
C. There can be no serious question as to the constitutionality of Section 10(b)(3) ..... Page 14
D. This Court's *Oestereich* decision is distinguishable and is not controlling here 15
E. The *Oestereich* exception should be limited, for policy reasons, to statutory exemption situations 23
II. There is no merit to any of petitioner's other contentions 25
A. Petitioner's First Amendment rights have not been violated 26
B. Application of the delinquency regulations is not punishment 29
C. Petitioner was not deprived of any protected right even though he received his delinquency notice and his notice of reclassification on the same day 32
Conclusion 33
Appendix A 35
Appendix B 41

CITATIONS

Cases:
Abramson, In re, 196 F. 2d 261 10
Adderley v. *Florida*, 385 U.S. 39 26
Anderson v. *Hershey*, 410 F. 2d 492, pending on petition for a writ of certiorari, No. 449, this Term 16, 18, 19, 21
Batterton v. *United States*, 260 F. 2d 233 10
Billings v. *Truesdell*, 321 U.S. 542 10
Biron v. *Collins*, 145 F. 2d 758 8
Board of Education v. *Barnette*, 319 U.S. 624 31

Cases—Continued

	Page
Boyd v. *Clark*, 393 U.S. 316	14, 18
Brown v. *United States*, 401 F. 2d 769	31
Cameron v. *Johnson*, 390 U.S. 611	27, 28
Clark v. *Gabriel*, 393 U.S. 256	4, 12, 14, 17
Cox v. *Louisiana*, 379 U.S. 559	27
Cox v. *United States*, 332 U.S. 442	9, 14
Davis v. *United States*, 199 F. 2d 689	10
Dombrowski v. *Pfister*, 380 U.S. 479	28
Eagles v. *United States ex rel. Samuels*, 329 U.S. 304	9
Falbo v. *United States*, 320 U.S. 549	7, 8, 12, 13, 14
Fletcher v. *United States*, 129 F. 2d 262	7
Fults v. *United States*, 395 F. 2d 852	31
Gibson v. *United States*, 149 F. 2d 751, reversed, 329 U.S. 338	7
Groban, In re, 352 U.S. 330	32
Gutknecht v. *United States*, No. 71, this Term	29
Heikkila v. *Barber*, 345 U.S. 229	13
Hirabayashi v. *United States*, 320 U.S. 81	8
Jessen v. *United States*, 212 F. 2d 897	10
Jewell v. *United States*, 208 F. 2d 770	10
Kennedy v. *Mendoza-Martinez*, 372 U.S. 144	30, 31
Klopp v. *United States*, 148 F. 2d 659	7
Knox v. *United States*, 200 F. 2d 398	10
Kolden v. *Selective Service Local Bd. No. 4*, 406 F. 2d 631, pending on petition for a writ of certiorari, No. 70, this Term	18
Kraus v. *Selective Service System Local Bd. No. 25*, 408 F. 2d 622, pending on petition for a writ of certiorari, No. 331, this Term	18, 19
Lauf v. *E. G. Shinner & Co.*, 303 U.S. 323	13
Lockerty v. *Phillips*, 319 U.S. 182	13
McCoy v. *United States*, 403 F. 2d 896	31
Mintz v. *Howlett*, 207 F. 2d 758	10
National Student Ass'n v. *Hershey*, 412 F. 2d 1103	28

Cases—Continued

	Page
Nevitt, In re, 117 Fed. 448	31
Nickerson v. *United States*, 391 F. 2d 760, certiorari denied, 392 U.S. 907	31
Oestereich v. *Selective Service Bd.*, 393 U.S. 233	4, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25
Olvera v. *United States*, 223 F. 2d 880	10
People v. *Stover*, 12 N.Y. 2d 462, 191 N.E. 2d 272, appeal dismissed *sub nom. Stover* v. *New York*, 375 U.S. 42	27
People v. *Street*, 20 N.Y. 2d 231, 229 N.E. 2d 187, reversed *sub nom. Street* v. *New York*, 394 U.S. 576	27
Pine v. *United States*, 212 F. 2d 93	10
Rempel v. *United States*, 220 F. 2d 949	10
Riles v. *United States*, 223 F. 2d 786	10
Schuman v. *United States*, 208 F. 2d 801	10
Shiffman v. *Selective Service Local Bd. No. 5*, 391 U.S. 930	18
Shigeru Fujii v. *United States*, 148 F. 2d 298, certiorari denied *sub nom. Tamesa* v. *United States*, 325, U.S. 868	7, 8
Sirski v. *United States*, 145 F. 2d 749	7
Smith v. *United States*, 148 F. 2d 288, reversed, 327 U.S. 114	7
South Carolina v. *Katzenbach*, 383 U.S. 301	13
Stromberg v. *California*, 283 U.S. 359	27
Tinker v. *Des Moines School Dist.*, 393 U.S. 503	27
United States v. *Bender*, 206 F. 2d 247	10
United States v. *De Lime*, 223 F. 2d 96	10
United States v. *Dicks*, 392 F. 2d 524	31
United States v. *Diercks*, 223 F. 2d 12, certiorari denied, 350 U.S. 841	10
United States v. *Estep*, 150 F. 2d 768, reversed, 327 U.S. 114	7, 8, 9, 10, 14

Cases—Continued

	Page
United States v. *Flakowicz*, 146 F. 2d 874, certiorari denied, 325 U.S. 851	7
United States v. *Fry*, 203 F. 2d 638	10
United States v. *Hartman*, 209 F. 2d 366	10
United States v. *Miller*, 367 F. 2d 72, certiorari denied, 386 U.S. 911	21, 27, 28
United States v. *O'Brien*, 391 U.S. 367	6, 13, 21, 22, 27, 28
United States v. *Pekarski*, 207 F. 2d 930	10
United States v. *Ransom*, 223 F. 2d 15	10
United States v. *Rinko*, 147 F. 2d 1, certiorari denied, 325 U.S. 851	7
United States v. *Ruzicka*, 329 U.S. 287	13
United States v. *Scully*, 225 F. 2d 113, certiorari denied, 350 U.S. 897	32
United States v. *Stiles*, 169 F. 2d 455	10
United States ex rel. Berman v. *Craig*, 207 F. 2d 888	10
United States ex rel. Trainin v. *Cain*, 144 F. 2d 944, certiorari denied, 323 U.S. 795	8
Wiggins v. *United States*, 261 F. 2d 113, certiorari denied, 359 U.S. 942	10
Witmer v. *United States*, 348 U.S. 375	11, 12
Yakus v. *United States*, 321 U.S. 414	13
Zigmond v. *Selective Service Local Bd. No. 16*, 391 U.S. 930	18

Constitution, statutes and regulations:

United States Constitution:	
Article I:	
Section 8	13
Section 9	23
Article III, Sec. 1	12
First Amendment	27, 28
Fifth Amendment	32
Sixth Amendment	32

Constitution, statutes and regulations—Cont.

Page

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 13

Emergency Price Control Act of 1942, 56 Stat. 23 13

Military Selective Service Act of 1967 (formerly the Universal Military Training and Service Act), 65 Stat. 75, as amended, 81 Stat. 100:

- Section 1(b) (50 U.S.C. App. 451(b)) 5
- Section 3 (50 U.S.C. App. 453) 6
- Section 4 (50 U.S.C. App. 454) 23
- Section 5 (50 U.S.C. App. 455) 6, 23
- Section 6(b) (50 U.S.C. App. 456(b)) 24
- Section 6(c) (50 U.S.C. App. (Supp. IV) 456(c)) 24
- Section 6(g) (50 U.S.C. App. 456(g)) 4, 15, 20, 23
- Section 6(h) (50 U.S.C. App. 456(h)) 6, 20
- Section 6(h)(1) (50 U.S.C. App. (Supp. IV) 456(h)(1)) 4, 20, 22, 35
- Section 6(i) (50 U.S.C. App. 456(i)) 20
- Section 6(o) (50 U.S.C. App. 456(o)) 24
- Section 10(b)(3) (50 U.S.C. App. (Supp. IV) 460(b)(3)) 2, 3, 4, 5, 6, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25, 35
- Section 12(o) (50 U.S.C. App. (Supp. IV) 462(a)) 21
- Section 12(b)(3) (50 U.S.C. App. (Supp. IV) 462(b)(3)) 22
- Section 12(b)(6) (50 U.S.C. App. (Supp. IV) 462(b)(6)) 21

Selective Draft Act of 1917, Section 4, 40 Stat. 80 ..... 6, 10

Selective Service Act of 1948, Section 10(b)(3), 62 Stat. 618 ..... 6, 13, 14

Constitution, statutes and regulations—Continued
Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. App. (1940 ed.) 301 *et seq*---- Page 5
Section 10(a), (54 Stat. 893)---- 6
Universal Military Training and Service Act of 1951, 65 Stat. 75 *et seq.*, Section 10(b)(3), 50 U.S.C. App. (1952 ed.) 460(b)(3)---- 6
Selective Service Regulations:
Section 1602.10 (32 C.F.R. 1602.10)---- 2, 29
Section 1617.1 (32 C.F.R. 1617.1)---- 3, 15, 22, 26, 37
Section 1623.5 (32 C.F.R. 1623.5)---- 22, 26, 37
Section 1625.2 (32 C.F.R. 1625.2)---- 2
Section 1631.7 (32 C.F.R. 1631.7)---- 2, 29
Section 1631.7(a) (32 C.F.R. 1631.7(a))- 32
Section 1631.7(a)(1) 32 C.F.R. 1631.7(a)(1))---- 2
Section 1642.4 (32 C.F.R. 1642.4)---- 15, 29, 37
Section 1642.4(a) (32 C.F.R. 1642.4(a))- 2, 32
Section 1642.4(b) (32 C.F.R. 1642.4(b))- 37
Section 1642.4(c) (32 C.F.R. 1642.4(c))- 2, 30, 33, 38
Section 1642.12 (32 C.F.R. 1642.12)--- 2, 29, 38
Section 1642.14 (32 C.F.R. 1642.14)---- 2, 30, 33, 39
Section 1642.14(a) (32 C.F.R. 1642.14(a))---- 2, 39
Section 1642.14(b) (32 C.F.R. 1642.14(b))---- 39
Section 1642.14(c) (32 C.F.R. 1642.14(c))---- 39

Miscellaneous:

	Page
113 Cong. Rec. 15426	12
H. Conf. Rep. No. 346, 90th Cong., 1st Sess.	12
H. Rep. No. 267, 90th Cong., 1st Sess.	11
Joint Statement of Attorney General Ramsey Clark and Director of Selective Service Lewis B. Hershey, issued December 9, 1967	41
S. Rep. No. 1268, 80th Cong., 2d Sess.	13, 14
S. Rep. No. 209, 90th Cong., 1st Sess.	12

In the Supreme Court of the United States

OCTOBER TERM 1969

No. 65

TIMOTHY J. BREEN, PETITIONER

v.

SELECTIVE SERVICE LOCAL BOARD NO. 16, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court (A. 12–21) is reported at 284 F. Supp. 749. The opinion of the court of appeals (A. 22–36) is reported at 406 F. 2d 636.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1969. The petition for a writ of certiorari was filed on March 10, 1969, and was granted on April 28, 1969 (394 U.S. 997). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 460(b)(3)) prohibits pre-induction judicial re-

366-432—69——2

view of the delinquency reclassification to I–A of a registrant previously classified II–S and deferred as an undergraduate college student.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Military Selective Service Act of 1967 and the Selective Service regulations and reprinted in Appendix A, *infra*, pp. 35–39.

STATEMENT

Selective Service System regulations authorize local boards to declare to be a delinquent any registrant who has "failed to perform any duty or duties required of him under the selective service law * * *"[1] (32 C.F.R. 1642.4(a)). The regulations also authorize the reclassification of such registrants into I–A (available for military service) (32 C.F.R. 1642.12). Although delinquents are to be given the highest priority for induction into the Armed Forces (32 C.F.R. 1631.7(a)(1)), a delinquent registrant may, under the regulations, be removed from the status "at any time" (32 C.F.R. 1642.4(c)). A reclassified delinquent is also entitled to a personal appearance before his local board, may have his classification reopened at any time prior to induction (without regard to the normal restrictions against reopening, see 32 C.F.R. 1625.2), and may appeal his classification to the state appeal board (32 C.F.R. 1642.14). Section 10(b)(3) of the Military Selective Service Act of 1967 prohibits judi-

[1] "Selective service law" is defined to include "title I of the Military Selective Service Act of 1967 [50 U.S.C. App. 451 *et seq.*] and all the rules and regulations issued thereunder" (32 C.F.R. 1602.10).

ial review of "the classification or processing of any egistrant" prior to his induction or refusal to submit hereto when so ordered.

On January 8, 1968, petitioner, an undergraduate tudent at the Berkeley School of Music in Boston, Massachusetts, was declared to be a delinquent by his ocal board for failing to comply with the provisions of he Selective Service law which require that he maintain his registration certificate in his personal possession at all times (32 C.F.R. 1617.1) (A. 2).[2] On January 9, 1968, his II–S (student deferment) classification was changed by his local board to I–A (A. 2).

On February 20, 1968, while petitioner's administrative appeal was still pending, he filed this preinduction suit to overturn his I–A classification and enjoin his induction into the Armed Forces (A. 2–3).[3] The district court dismissed the complaint for lack of jurisdiction, relying on Section 10(b)(3) of he Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 460(b)(3)). That section, as already noted, prohibits judicial review of "the classification or processing of any registrant" until "after the registrant has responded either affirmatively or negatively" to an induction order (A. 12–21). The court of appeals, with one judge dissenting, affirmed (A. 22–36).

[2] In November 1967, he delivered his certificate to a Boston clergyman to protest the conflict in Vietnam (A. 2).

[3] The administrative appeal was denied subsequent to the decision of the district court dismissing the complaint (A. 24). Petitioner's induction has been stayed pending a decision by this Court.

SUMMARY OF ARGUMENT

The central question presented here is whether both courts below properly dismissed this action for want of jurisdiction in light of Section 10(b)(3)'s express bar against pre-induction judicial review. This question requires an affirmative answer. In Section 10(b)(3), Congress has prescribed a specific timetable for challenging local board decisions in the courts. Since that timetable prohibits judicial review before the registrant's induction into military service, the courts below properly dismissed the present pre-induction suit for lack of jurisdiction.

This court's decision in *Oestereich* v. *Selective Service Bd.,* 393 U.S. 233, does not require a contrary conclusion. As the court of appeals correctly noted, the situation here is distinguishable from that which led this Court in *Oestereich* to refuse to apply Section 10(b)(3)'s bar. Unlike *Oestereich,* where an explicit statutory exemption was involved, the instant case involves a registrant eligible only for a deferment which would merely postpone his military training and service, and not relieve him entirely from that obligation. And, unlike the unqualified IV–D ministerial student exemption to which Oestereich was entitled under Section 6(g) of the Act, petitioner enjoyed only a II–S college student deferment under Section 6(h)(1), which deferments are expressly subject to "such rules and regulations as [the President] may prescribe." In view of this Court's restricting its *Oestereich* opinion to statutorily granted exemptions, which reinforces the foregoing analysis, as well as the holding in *Clark* v. *Gabriel,* 393 U.S. 256, that Section

10(b)(3) precludes pre-induction judicial review where the board's action has a statutory basis and does not effectively remove an explicit and unconditional exemption, petitioner is not entitled to pre-induction review.

ARGUMENT

I. SECTION 10(b)(3) OF THE MILITARY SELECTIVE SERVICE ACT OF 1967 WAS PROPERLY APPLIED BY THE COURTS BELOW TO PROHIBIT THE PRE-INDUCTION JUDICIAL REVIEW OF PETITIONER'S DELINQUENCY RECLASSIFICATION FROM II-S TO I-A.

A. THE BACKGROUND AND HISTORY OF SECTION 10(b)(3) CONFIRMS THAT A PROHIBITION AGAINST PRE-INDUCTION JUDICIAL REVIEW IS ESSENTIAL TO AVOID LITIGIOUS INTERRUPTIONS OF THE NATION'S PROGRAM FOR PROCUREMENT OF PERSONNEL FOR MILITARY SERVICE

In 1940, with war breaking out around the globe, Congress determined that, although this nation was still at peace, it was "imperative to increase and train the personnel of the armed forces of the United States". This declaration of national necessity from the opening sentence of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. App. (1940 ed.) 301 *et seq.*, recites a condition which has remained more or less constant to the present day. Although almost thirty years have passed since that law was enacted, the country's survival still demands that a strong military and defense establishment be maintained. See Section 1(b) of the Military Selective Service Act of 1967 (50 U.S.C. App. 451(b)).

Since 1940, this nation's young men have generally been subject to compulsory military service under various draft laws. These laws have created a Selective Service System, and have provided for the regis-

tration of young men and for their classification, by local draft boards composed of civilians, into groups in accordance with the different categories Congress has seen fit to establish. See *United States* v. *O'Brien*, 391 U.S. 367, 377. Congress has consistently shown its awareness of the necessity for efficient procurement of men for the Armed Forces, and plainly intended that there be minimal interference with the process of selection. Local boards have thus understandably been given considerable discretion in carrying out their assigned tasks of registering, classifying, and processing men of draft age.[4] Of special significance is the fact that every draft law since 1940 has specifically provided that the administrative decisions by the local boards shall be "final".[5]

In 1944 this Court first had occasion to determine the extent to which this finality provision precluded judicial review of actions taken by the Selective Service System, in *Falbo* v. *United States*, 320 U.S. 549. In *Falbo* a registrant classified as a conscientious objec-

[4] See, as to registration, 50 U.S.C. App. 453; as to manner of selection and classification, 50 U.S.C. App. 455; as to deferments, 50 U.S.C. App. 456(h).

[5] Selective Training and Service Act of 1940, Section 10(a), 54 Stat. 893; Selective Service Act of 1948, Section 10(b)(3), 62 Stat. 618, 619–620; Universal Military Training and Service Act of 1951, 65 Stat. 75, Section 10(b)(3), 50 U.S.C. App. (1952 ed.) 460(b)(3); Military Selective Service Act of 1967, 81 Stat. 100, Section 10(b)(3), 50 U.S.C. App. (Supp. IV) 460(b)(3). A similar provision prevailed during World War I—the Selective Draft Act of 1917, Section 4, 40 Stat. 80.

tor despite his claimed entitlement to a ministerial exemption failed to obey the order of his draft board to report for assignment to civilian work in lieu of military service. He was convicted of violating the draft law. In upholding the conviction, the Court noted that the registrant could have been rejected as physically unfit had he reported, and therefore had not completed the "continuous process" of selection which Congress had devised (320 U.S. at 552–553). Emphasizing the need to avoid "litigious interruption" of the orderly and efficient raising of manpower for the Armed Forces, the Court held that Congress had not authorized judicial review, even in a criminal prosecution, of the propriety of a board's classification "before final acceptance of an individual for national service" (320 U.S. at 554).

For the rest of World War II, the courts, following *Falbo,* uniformly held that registrants could not challenge their processing or classification even as a defense to a criminal action for failing to obey a Selective Service order.[6] While judicial review of

[6] *Sirski* v. *United States*, 145 F. 2d 749 (C.A. 1); *United States* v. *Flakowicz*, 146 F. 2d 874 (C.A. 2), certiorari denied, 325 U.S. 851; *United States* v. *Estep*, 150 F. 2d 768 (C.A. 3), reversed, 327 U.S. 114; *Smith* v. *United States*, 148 F. 2d 288 (C.A. 4), reversed, 327 U.S. 114; *Fletcher* v. *United States*, 129 F. 2d 262 (C.A. 5); *Klopp* v. *United States*, 148 F. 2d 658 (C.A. 6); *United States* v. *Rinko*, 147 F. 2d 1 (C.A. 7), certiorari denied, 325 U.S. 851; *Gibson* v. *United States*, 149 F. 2d 751 (C.A. 8), reversed, 329 U.S. 338; *Shigeru Fujii* v. *United States*, 148 F. 2d 298 (C.A. 10), certiorari denied *sub nom. Tamesa* v. *United States*, 325 U.S. 868.

challenged induction orders in criminal actions was thus seemingly foreclosed by *Falbo,* the courts did recognize that there could be review of draft board action in a habeas corpus proceeding brought after induction.[7] In 1946, however, this Court, in *Estep* v. *United States,* 327 U.S. 114, made it clear that defendants could challenge the propriety of their classification as a defense to a criminal action.

In *Estep* registrants classified I–A by their local draft boards had, like Falbo, claimed to be entitled to ministerial exemptions. After exhausting their administrative appeals they were ordered to report for induction. Unlike Falbo they reported but, after being accepted for service at the induction center, they refused to submit. One sought to defend on the ground that the draft board had "acted arbitrarily and capriciously", and also claimed that there were certain procedural irregularities in the administrative processing of his appeal (327 U.S. at 117). The other contended that the denial of the ministerial exemption was "without any foundation of fact" and that he had been discriminated against because he was a Jehovah's Witness (327 U.S. at 118). The lower courts had held that these issues were immaterial to the question of their refusal to comply with the induction order, but this Court reversed and held that where a registrant has completed every step in

[7] See, *e.g., Hirabayashi* v. *United States,* 320 U.S. 81, 108 (concurring opinion); *United States ex rel. Trainin* v. *Cain,* 144 F. 2d 944 (C.A. 2), certiorari denied, 323 U.S. 795; *Biron* v. *Collins,* 145 F. 2d 758 (C.A. 5); *Shigeru Fujii* v. *United States,* 148 F. 2d 298 (C.A. 10), certiorari denied *sub nom. Tamesa* v. *United States,* 325 U.S. 868.

the Selective Service process short of submitting to induction, judicial review of the classification underlying the induction order could be had in the criminal prosecution for failing to submit.

In reaching this result, the Court concluded that the provision making decisions of Selective Service boards "final" was designed to accomplish two purposes. First, it was intended to prevent the "litigious interruption" of the Selective Service process. Allowance of judicial review of a registrant's classification following his final acceptance for service and his refusal to submit did not, however, interfere with the orderly operation of the system of manpower procurement. Second, the Court held that the finality provision was designed to prevent the courts from becoming super draft boards and was meant to limit the scope of inquiry when judicial review was had. Thus, courts could overturn a draft board's action only if it acted "so contrary to its granted authority as to exceed its jurisdiction" (327 U.S. at 120) or if the classification had "no basis in fact" (327 U.S. at 122).[8]

The result of this decision was that if, after post-induction review of the administrative record, such a defect in the local board's action was established, the registrant would be released from service if he had submitted, or would be acquitted of the criminal

[8] That standard was incorporated into the statute in amended Section 10(b)(3) in 1967. It might be noted that the scope of judicial review in habeas corpus actions is the same as in criminal actions. See, *e.g.*, *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304; *Cox* v. *United States*, 332 U.S. 442, 449 (opinion of Mr. Justice Reed).

charge of failing to submit to induction.[9] It thus became doubly clear that even if the draft board's action was challenged on the ground that it was "lawless and beyond its jurisdiction" (*Estep* v. *United States*, *supra*, 327 U.S. at 120–121), there would still be no departure from the general and well-established bar against pre-induction judicial review. Instead, "[q]uestions concerning the classification of the registrant [would have to] be raised either in a petition

---

[9] Cases where no basis in fact for the classification was found include: *United States* v. *Hartman*, 209 F. 2d 366 (C.A. 2); *United States* v. *Pekarski*, 207 F. 2d 930 (C.A. 2); *Pine* v. *United States*, 212 F. 2d 93 (C.A. 4); *Wiggins* v. *United States*, 261 F. 2d 113 (C.A. 5), certiorari denied, 359 U.S. 942; *Riles* v. *United States*, 223 F. 2d 786 (C.A. 5); *Jewell* v. *United States*, 208 F. 2d 770 (C.A. 6); *United States* v. *Ransom*, 223 F. 2d 15 (C.A. 7); *Batterton* v. *United States*, 260 F. 2d 233 (C.A. 8); *Schuman* v. *United States*, 208 F. 2d 801 (C.A. 9); *Jessen* v. *United States*, 212 F. 2d 897 (C.A. 10); *Rempel* v. *United States*, 220 F. 2d 949 (C.A. 10).

Those where the registrant was found to have been deprived of due process by procedural irregularities include: *United States* v. *Fry*, 203 F. 2d 638 (C.A. 2); *Mintz* v. *Howlett*, 207 F. 2d 758 (C.A. 2); *United States* v. *Stiles*, 169 F. 2d 455 (C.A. 3); *In re Abramson*, 196 F. 2d 261 (C.A. 3); *United States* v *Bender*, 206 F. 2d 247 (C.A. 3); *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (C.A. 3); *United States* v. *De Lime*, 223 F. 2d 96 (C.A 3); *Olvera* v. *United States*, 223 F. 2d 880 (C.A. 5); *Davis* v. *United States*, 199 F. 2d 689 (C.A. 6); *United States* v. *Diercks*, 223 F. 2d 12 (C.A. 7), certiorari denied, 350 U.S. 841; *Knox* v. *United States*, 200 F. 2d 398 (C.A. 9).

Under the Selective Draft Act of 1917 the courts were not called upon to enforce induction orders by criminal sanctions. The receipt of an order to report for induction subjected the inductee to military law. He could then be tried for desertion should he fail to report. See *Billings* v. *Truesdell*, 321 U.S. 542, 545–546, and cases there cited.

for habeas corpus or as a defense to prosecution for failure to submit to induction into the armed forces." *Witmer* v. *United States,* 348 U.S. 375, 377.

B. THE ENACTMENT OF AMENDED SECTION 10(b)(3) IN 1967 UNDERSCORES CONGRESSIONAL INSISTENCE THAT THE PROHIBITION OF PRE-INDUCTION JUDICIAL REVIEW IS A NECESSARY DETERRENT TO LITIGIOUS INTERRUPTIONS OF THE CLASSIFICATION AND INDUCTION PROCESS

Congressional reiteration of the need for avoiding pre-induction litigation challenging local board decisions was manifested in the 1967 enactment of the Military Selective Service Act. In pertinent part, amended Section 10(b)(3), enacted as part of that Act, provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after a registrant has responded either affirmatively or negatively to an order to report for induction * * *.

The purpose of Congress in amending Section 10(b)(3) was made quite clear. It was disturbed by the "apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies", although "[e]xisting law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order." H. Rep. No. 267, 90th Cong., 1st Sess., p. 30. It

therefore provided in unmistakable language that there was to be no judicial review of a Selective Service classification—or related actions—until "after a registrant has responded either affirmatively or negatively" to an induction order, thus codifying what had previously been accepted as the existing law. See *Witmer* v. *United States, supra.*

In the words of Senator Russell, Chairman of the Senate Armed Services Committee (paraphrasing this Court in *Falbo* v. *United States,* 320 U.S. 549, 554), the amendment was designed "to prevent litigious interruptions of procedures to provide necessary military manpower." 113 Cong. Rec. 15426.[10] See *Clark* v. *Gabriel,* 393 U.S. 256, 258–259. The congressional aim was not to deny review entirely, but rather to postpone it. It reflected a considered legislative judgment, entitled to considerable weight by the courts, that any hardship and risk entailed thereby were outweighed by the need for a system which could function effectively and expeditiously in raising manpower for the nation's defense and security.

Pursuant to Article III, Section 1, of the Constitution, Congress has the power to "define and limit the jurisdiction of the inferior courts of the United

[10] The Senate was prepared merely to reaffirm "the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction." S. Rep. No. 209, 90th Cong., 1st Sess., p. 10. The House, however, deemed it of utmost importance that there be no pre-induction judicial review and recommended that Section 10 (b) (3) be amended to prohibit it specifically and flatly. H. Conf. Rep. No. 346, 90th Cong., 1st Sess., p. 16.

States." *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330;[11] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331. Section 10(b)(3) is a valid exercise of this power, as well as the power of Congress under Article I, Section 8, to raise and support armed forces. See *United States* v. *O'Brien, supra*, 391 U.S. at 377. As this Court said in *Falbo* v. *United States, supra*, 320 U.S. at 554, "Congress was not required to provide for judicial intervention before final acceptance of an individual for national service". Indeed, the courts have, with rare exceptions, declined so to interfere with the selection process. Congress, in amending Section 10(b)(3), merely confirmed and made explicit this accepted rule.[12]

[11] Thus, for example, this Court has sustained the Emergency Price Control Act of 1942 (56 Stat. 23), withdrawing jurisdiction over challenges to regulations and orders issued pursuant to that Act from the inferior federal courts and vesting it in the Emergency Court of Appeals (*Lockerty* v. *Phillips*, 319 U.S. 182), and precluding the consideration of the validity of price regulations issued under that Act as a defense to a criminal prosecution for their violation initiated in the district courts. *Yakus* v. *United States*, 321 U.S. 414. See also *United States* v. *Ruzicka*, 329 U.S. 287, where the Court, noting the necessity to avoid delay in the administration of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), held that producers could not assert the illegality of an order issued thereunder as a defense in a civil suit for enforcement, but had to file a challenge with the Secretary of Agriculture with subsequent judicial review. Similarly, in *Heikkila* v. *Barber*, 345 U.S. 229, this Court sustained the limitation of judicial review of deportation orders to habeas corpus actions.

[12] That Congress has consistently intended to limit judicial review to post-induction actions is underscored by the Senate Report on the Selective Service Act of 1948: "No changes have been made in the nature of judicial review of selective-service classifications. Instead, it is contemplated that the *procedure and*

C. THERE CAN BE NO SERIOUS QUESTION AS TO THE CONSTITUTIONALITY OF SECTION 10(b)(3)

Petitioner's constitutional arguments as to the asserted invalidity of Section 10(b)(3) were before this Court in *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233, and in the companion case decided along with it—*Clark* v. *Gabriel, supra.* At that time, as noted in the opinion below, the constitutional claims there asserted were "rejected *sub silentio* in *Gabriel*" (A. 27). Indeed, this Court's opinion in *Gabriel* expressly rejected the argument that Section 10(b)(3)'s bar against pre-induction judicial review is unconstitutional. There the Court said it found "no constitutional objection" to the deferral of challenges to most board actions until after induction, and cited the *Falbo* and *Estep* cases with apparent approval (393 U.S. at 259). In *Oestereich* itself the Court stated that its "construction leaves § 10(b)(3) unimpaired in the normal operations of the Act" (393 U.S. at 238). See, also *Boyd* v. *Clark*, 393 U.S. 316. In view, then, of the holding in *Gabriel* and the language in the *Oestereich* opinion, petitioner's argument as to the unconstitutionality of Section 10(b)(3) is untenable and does not call for more extended discussion.

---

scope of review defined by the Supreme Court in enforcing the 1940 Act will be equally applicable under this legislation. (See *Falbo* v. *United States* (320 U.S. 549); *Estep* v. *United States* (327 U.S. 114, 122–123); *Cox* v. *United States* (332 U.S. 442, 448–449)" (emphasis added). S. Rep. No. 1268, 80th Cong., 2d Sess., p. 20. This history refutes petitioner's contention (Pet. Br. 29–31) that in the 1948 Act Congress merely meant to limit the scope of judicial review rather than its timing. In any event, the recent amendment to section 10(b)(3) removes any doubt on this score.

D. THIS COURT'S *OESTEREICH* DECISION IS DISTINGUISHABLE AND IS NOT CONTROLLING HERE

In attempting to avoid the bar of amended Section 10(b)(3), petitioner seeks to bring his situation within the limited rationale of *Oestereich* v. *Selective Service Bd., supra.* Petitioner maintains that the same clash between a clear statutory mandate and the provisions of Section 10(b)(3) that the Court found present there is equally present here. However, the instant case is distinguishable from *Oestereich,* and the courts below correctly applied Section 10(b)(3) in light of the differing circumstances.

Oestereich involved a divinity student who, pursuant to Section 6(g) of the Act (50 U.S.C. App. 456(g)), was classified IV–D and was expressly "exempt from training and service". As a protest against the conflict in Vietnam, Oestereich returned his registration certificate to the government. Shortly thereafter, his local draft board declared him to be a delinquent for failing to have the certificate "in his personal possession at all times" (as required by 32 C.F.R. 1617.1), pursuant to 32 C.F.R. 1642.4. He was thereupon reclassified I–A and was ordered to report for induction. He brought suit to review his reclassification and enjoin his induction. Relying on Section 10(b)(3), the district court dismissed the complaint and the court of appeals affirmed.

In the government's brief in this Court, it was conceded that as a full-time ministerial student Oestereich was entitled to the unequivocal exemption afforded such registrants by Section 6(g) of the Act. It was on

that basis that we suggested—and this Court ruled—that Oestereich was entitled to retain his ministerial student exemption and that there was no statutory authorization for his reclassification into I-A pursuant to regulations which were triggered by "activities or conduct not material to the grant or withdrawal of the exemption" (393 U.S. at 237). In such circumstances, the Court concluded that to compel a registrant, who was clearly *exempt* by statute from military service to submit nonetheless to induction (or to face criminal prosecution) in order to establish his "plain and unequivocal" and *uncontested* right to such an exemption, would be unduly harsh (393 U.S. at 238). Accordingly, in reconciling the two apparently inconsistent provisions, the Court determined that Congress could not have intended Section 10(b)(3) to be applicable in such a situation, and held that "pre-induction judicial review is not precluded in cases of this type" (393 U.S. at 239).

The exception to the express bar of Section 10(b)(3) carved out by this Court in *Oestereich* is a narrow one and should, in our view, be sparingly employed. As recently noted by the Sixth Circuit, this exception was "meticulously confined to the application of the delinquency regulations to a statutory exemption" *Anderson* v. *Hershey*, 410 F. 2d 492, 494, pending on petition for a writ of certiorari, No. 449, this Term. Indeed, the *Oestereich* opinion indicates that the Court painstakingly and deliberately limited the reach of its holding there—and by implication the underlying rationale—to situations involving a reg-

istrant allegedly entitled to a statutory exemption. In the dispositive paragraphs of its opinion (393 U.S. at 236–239), the Court referred to the concept of a "statutory exemption" at least a dozen times, but made no reference whatever to the matter of deferments from service, insofar as the operation of Section 10(b)(3) is concerned. The dissenting opinion, moreover, acknowledged that "[t]he Court seems to limit its holding to statutory 'exemptions'" (393 U.S. at 249, n. 9), although suggesting, presumably by way of criticism, that "'deferments' may just as 'plainly' preclude a registrant's induction" (*ibid.*).

To be sure, the Court did not have before it in *Oestereich* the question of the application of Section 10(b)(3)'s bar to deferred as distinguished from exempt registrants who had been reclassified. But the purposeful restriction of the language in *Oestereich* to the exemption situation cannot be dismissed lightly. Under this analysis, even where it is alleged that a draft board has misapplied the statutory standard, Section 10(b)(3) will bar pre-induction judicial review except where a statutorily mandated exemption was previously enjoyed and is presently claimed by the registrant. As indicated by Mr. Justice Douglas, the author of *Oestereich*, in his concurring opinion in *Clark* v. *Gabriel, supra,* 393 U.S. at 260, "it takes the extreme case where the Board can be said to flout the law * * * to warrant pre-induction review of its actions." Moreover, Section 10(b)(3) also applies to those situations where some provision of the Act is challenged on constitutional grounds in cases where the exercise of judgment by the local board is not necessarily at

issue. *Boyd* v. *Clark*, 393 U.S. 316. In sum, *Oestereich* "leaves § 10(b)(3) unimpaired in the normal operations of the Act" (393 U.S. at 238).

All of the courts of appeals which have considered the question have held that Section 10(b)(3) prohibits pre-induction review of the delinquency reclassification of registrants who claim a continuing entitlement to deferment. *Anderson* v. *Hershey, supra* (undergraduate student deferment, dependency deferment and registrant classified as unfit for service); *Kolden* v. *Selective Service Local Bd. No. 4*, 406 F. 2d 631 (C.A. 8) (graduate student deferment);[13] *Kraus* v. *Selective Service System Local 25*, 408 F. 2d 622 (C.A. 4) (dependency deferment).[14] Thus, the Fourth, Sixth, and Eighth Circuits, as well as the Second Circuit in its decision below, have all construed *Oestereich* as being limited to the *exemption* situation, and as not impinging upon the application of Section 10(b)(3)'s bar where *deferments* are involved. See also this Court's denial of stays in *Shiffman* v. *Selective Service Local Bd. No. 5*, 391 U.S. 930 (occupational deferment), and *Zigmond* v. *Selective Service Local Bd. No. 16*, 391 U.S. 930 (registrant over 26).[15]

[13] *Kolden* is pending on a petition for a writ of certiorari, No. 70, this Term. There the court of appeals refrained from expressing a view on the applicability of Section 10(b)(3)'s bar to undergraduate students having II–S deferments (see 406 F. 2d at 635, n. 6).

[14] *Kraus* is pending on a petition for a writ of certiorari, No. 331, this Term.

[15] *Zigmond* involved a First Circuit decision rendered prior to *Oestereich*.

Some of the reasoning of these courts of appeals in reading *Oestereich* restrictedly is pertinent and helpful here. After careful consideration the court below found the "conflict between statute and regulations that arose in *Oestereich*" not to be presented in the instant case. In *Kraus* the Fourth Circuit drew a sharp distinction between exempt and deferred registrants, insofar as the availability of pre-induction judicial review is concerned, concluding that "[t]he only exception to the deferment of judicial review [as prescribed in Section 10(b)(3)] recognized by the Supreme Court arises from administrative action that deprives a registrant of a statutory exemption" (408 F. 2d at 625). In *Anderson* the Sixth Circuit, while noting that the Court in *Oestereich* "did not articulate any difference between exemption and deferment" and "restricted itself to the statutory exemption problem," discerned a difference from the Court's "repeated confinement of its ruling to the case of one exempt by statute" (410 F. 2d at 494). As the court explained (*ibid.*):

> In the case of an exemption, the Congress has made the decision that qualifying persons shall be beyond the pool of manpower available for military purposes. In the case of a deferment, the Congress has tried to set priorities, to provide predictability, and to guarantee equality of treatment—but not immunity—for those within the available pool of manpower. An exempt person is predetermined to be outside the system; a deferred person is within. We deem this a significant line of demarcation.

These considerations apply fully in the instant case. A registrant seeking the benefit of the *Oestereich* exception must establish his eligibility for a statutory exemption from military service, as opposed to a deferment, and perhaps show as well a concession by the government that he is entitled thereto. As conceded by the government, Oestereich was statutorily exempt from service as a ministerial student. He therefore had only limited contacts with the Selective Service System, designed only to ensure that he remained entitled to that exemption. Petitioner, however, as a college student, simply had his liability to conscription deferred. By the explicit terms of the statute his deferment, unlike the unqualified exemption held by Oestereich, was subject to the "rules and regulations" of the Selective Service System and will terminate when he reaches 24 years of age, when he ceases to perform satisfactorily in his studies, or when he receives his baccalaureate degree. See Section 6(h)(1) of the Act (50 U.S.C. App. (Supp. IV) 456(b)(1)). Section 6(g) under which Oestereich was exempted, is unconditional and contains no reference to administrative discretion in its construction and application (see 393 U.S. at 234-235). While Section 6(h)(1) directs the deferment of college students, it does so "under such rules and regulations as [the President] may prescribe". Indeed, prior to 1967, college student deferments were, as petitioner notes (Pet. Br. 13–14), entirely a matter of administrative regulation, without any statutory direction whatsoever (see 50 U.S.C. App. 456(h) and (i)).

Unlike the *exempted* registrant, then, petitioner remains part of the "pool of manpower available for

military purposes" (*Anderson* v. *Hershey, supra,* 410 F. 2d at 494), even though *deferred.* It is of special importance that he comply with the pertinent regulations so that his local board may be fully apprised of his current status and that he may be fully cognizant of his obligations with regard to the maintenance of that status. *United States* v. *O'Brien, supra,* 391 U.S. at 377–378; *Anderson* v. *Hershey, supra,* 410 F. 2d at 495–498; *United States* v. *Miller,* 367 F. 2d 72 (C.A. 2), certiorari denied, 386 U.S. 911. And, as noted by the Court of Appeals for the Second Circuit in *United States* v. *Miller, supra,* 367 F. 2d at 81, the "proper functioning of the system depends upon the aggregated consequences of individual acts; in raising an army no less than in regulating commerce, cf. *Wickard* v. *Filburn,* 317 U.S. 111, 127–128, * * * the seriousness of an individual's acts must often be assessed not only in isolation but under the assumption that they may be multiplied manifold."

Moreover, the requirement that the deferred registrant (as opposed to one exempted from service) maintain his draft cards in his personal possession is an element in the process of establishing and continuing his deferment and thus contributes to the efficient procurement of men for the Armed Forces. Congress has recognized this and, in addition to the general criminal sanctions applicable to violation of the statute or the rules and regulations (Section 12(a), 50 U.S.C. App. (Supp. IV) 462(a)), has imposed specific criminal penalties dealing with the "possession" of draft cards. Section 12(b)(6) (50 U.S.C. App. (Supp IV) 462(b)(6)). That Congress is concerned with the function served by draft cards and the requirement that

they be kept in the registrant's personal possession is shown by its recent action in attaching criminal penalties to their destruction or mutilation. Public Law 89–152, amending Section 12(b)(3), 50 U.S.C. App. (Supp. IV) 462(b)(3), upheld in *United States* v. *O'Brien, supra.*[16] In view of this, and since the requirement that a deferred registrant maintain possession of his draft cards [17] plays an important role in the Selective Service System's processes, it is clear that Congress has approved the withdrawal of deferments from those who refuse to comply with the possession requirement and are, as a result, declared delinquents. Indeed, the very provision which relates to undergraduate deferments, Section 6(h)(1), also expressly recognizes the delinquency procedures.[18]

---

[16] The contention in petitioner's brief in *Gutknecht* (incorporated by reference by petitioner here (Pet. Br. 6)) that Congress could not specifically forbid an act already proscribed by some general provision was specifically rejected by this Court in *O'Brien* (see 391 U.S. at 380).

[17] "Every [registrant] *must* * * * have in his personal possession at all times his Registration Certificate * * *" (32 C.F.R. 1617.1; emphasis added). "Every person who has been classified by a local board *must* have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification * * *" (32 C.F.R. 1623.5; emphasis added). These express commands refute petitioner's contention that a registrant has no duty to maintain these cards in his personal possession.

[18] Section 6(h)(1), as amended in 1967, provides that after a registrant has been deferred as an undergraduate he is to be liable for induction "within the prime age group." "Prime age group" is then defined as "the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers".

It follows that the delinquency regulations should be viewed as applying with full force to deferred, as distinguished from exempt, registrants, notwithstanding *Oestereich*.

E. THE *OESTEREICH* EXCEPTION SHOULD BE LIMITED, FOR POLICY REASONS, TO STATUTORY EXEMPTION SITUATIONS

A distinction between exemptions and deferments, in regard to the applicability of Section 10(b)(3), is consistent with and reflective of the congressional policy manifested in that provision. Section 10(b)(3) cannot, as the Court pointed out in *Oestereich*, "sustain a literal reading" (393 U.S. at 238), since, *inter alia*, it does not expressly provide for review of classifications in habeas corpus proceedings in which an inductee seeks release from active duty (see United States Constitution, Article I, Section 9).[19] It was not read literally in *Oestereich*, but was construed so as to harmonize its language with other provisions of the Act.

Limiting the *Oestereich* exception to statutory exemptions would create a relatively small gap in the general bar on the "litigious interruptions" of the selection and processing of registrants for service as a result of pre-induction suits. Only ministers and ministerial students (50 U.S.C. App. 456(g)), individuals under 19 years of age and over a variable age limit determined periodically by Congress (50 U.S.C. App. 454, 455), veterans of military service

[19] However, in referring to review after a registrant had "responded either *affirmatively* or negatively to an order to report for induction." (emphasis added), Section 10(b)(3) at least impliedly contemplates the post-induction challenge of classifications in habeas corpus proceedings.

(50 U.S.C. App. 456(b)), reservists (50 U.S.C. App 456(c)), and sole surviving sons (50 U.S.C 456(o) appear to qualify for statutory exemptions unde existing legislation. The number of individuals i those categories whose service is likely to be sough is rather insignificant when compared with those a ready classified I–A or those having dependency, hard ship, occupational, and student deferments. The sug gested distinction between exempt and deferred regis trants would accordingly serve to achieve in prin ciple the objective intended by Congress in enactin Section 10(b)(3).

Any other result would substantially undermin the thrust of that provision and effectively read it ou of the Act, while opening the doors to a flood of pre induction litigation which could substantially impai the Selective Service System's operation in provid ing needed manpower. *Oestereich* should not be rea as allowing pre-induction judicial review of "an alleged board violation of a clear legal duty", as peti tioner urges (Pet. Br. 21). This would convert th courts into super draft boards and add another laye of review, available as of course, to the administra tive tier that already exists. The resulting disruptio of the system could well be chaotic. A far more com pelling case than petitioner has made would be nec essary before such a result should be given judicia sanction, in the face of a congressional determinatio to the contrary.

The foregoing considerations necessarily lead, w submit, to the conclusion that this case differs marked ly from *Oestereich,* and that the holding there is dis

tinguishable and not controlling here. There, we conceded that a ministerial student's express and unequivocal statutory *exemption* could not have been intended to be subject to termination through application of the delinquency regulations without judicial review. No such concession is made here, in view of the language in the *Oestereich* opinion and the policy reasons which support a narrow reading of the *Oestereich* exception to Section 10(b)(3)'s bar. Congress has explicitly subjected *deferments* to the "rules and regulations"—including the delinquency regulations—of the Selective Service System with full awareness of the possible results. Thus the elements in *Oestereich* which led this Court to fashion an exception to Section 10(b)(3) are lacking here and the express statutory bar to pre-induction judicial review accordingly should be held applicable.

II. THERE IS NO MERIT TO ANY OF PETITIONER'S OTHER CONTENTIONS

We have demonstrated above that the courts below correctly held that Section 10(b)(3) validly prohibits pre-induction judicial review of petitioner's delinquency reclassification. In view of that threshold bar to this action, the courts below properly refused to pass on the underlying merits of petitioner's contentions. For the same reason, this Court need go no further. However, even if those underlying contentions were to be considered, it is clear that there is no merit to petitioner's claim that he has been deprived of any constitutional or other rights.

A. PETITIONER'S FIRST AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED

There is no merit to petitioner's contention that he has a protected First Amendment right not to carry his draft card. First, it should be noted that the pertinent regulations are precise and narrowly drawn, fully apprising every registrant of his obligation to maintain both his registration certificate and his notice of classification "in his personal possession at all times" (32 C.F.R. 1617.1, 1623.5). Indeed, the documents themselves bear this legend. "There is no lack of notice", "nothing to entrap or fool the unwary" (*Adderley* v. *Florida*, 385 U.S. 39, 42). Second, there is no evidence that the local board considered anything besides petitioner's failure to maintain his registration certificate in his personal possession as a basis for the reclassification. The district court found (A. 4) and petitioner did not dispute (see A. 3) that "[t]he Board's actions were entirely by virtue of the draft regulations". Petitioner's bare allegations, unsupported by offers of proof, that the local board improperly considered the October 1967 letter and memorandum of General Hershey in declaring him to be a delinquent does not alter this fact. One month prior to the time when petitioner was declared to be a delinquent, the then Attorney General, in a joint statement with General Hershey, made it abundantly clear that delinquency reclassification is permitted only when a registrant "violates any duty affecting his own status (for example, giving false information, failing to appear for examination, or

failing to have a draft card)", and that "[l]awful protest activities, whether directed to the draft or other national issues, do not subject registrants to acceleration [of induction] or any other special administrative action by the Selective Service System" (App. B. 41–42).

We fully endorse this position and, for the convenience of the Court, have reprinted the entire text of this Joint Statement as Appendix B to this brief. Against this background, the evenhanded application of precise and narrowly drawn regulatory provisions, which are not designed to stifle free expression, do not run afoul of the First Amendment, regardless of the motives of the protestors. *United States* v. *O'Brien*, *supra*; *Cameron* v. *Johnson*, 390 U.S. 611.

Petitioner, although admittedly aware of the possession requirement, deliberately violated the regulations in an attempt to protest this nation's involvement in Vietnam. Such violation is privileged, he contends, because he sought to express an idea by the illegal act. This is an erroneous notion. While the First Amendment protects speech-related conduct,[20] the mere intent to express an idea does not bring an otherwise illegal act within its protective sphere. *Cox* v. *Louisiana*, 379 U.S. 559, 564.[21] Stated another

[20] *E.g.*, *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503; *Stromberg* v. *California*, 283 U.S. 359.

[21] See also *People* v. *Stover*, 12 N.Y. 2d 462, 191 N.E. 2d 272, appeal dismissed for want of a substantial federal question *sub nom. Stover* v. *New York*, 375 U.S. 42; *People* v. *Street*, 20 N.Y. 2d 231, 229 N.E. 2d 187, reversed on another ground *sub nom. Street* v. *New York*, 394 U.S. 576. As the Court of Appeals for the Second Circuit so aptly noted in *United States* v. *Miller*, *supra*, "The range of symbolic con-

way, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" (*United States* v. *O'Brien, supra,* 391 U.S. at 376). This Court has outlined the tests to be applied as follows (391 U.S. at 377):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. * * *

With these tests in mind, the Court upheld the provision which made it a criminal offense to knowingly destroy or mutilate draft cards. *United States* v. *O'Brien, supra. A fortiori,* the regulations presently under consideration do not abridge petitioner's First Amendment rights. *National Student Ass'n* v. *Hershey,* 412 F. 2d 1103, 1117 (C.A.D.C.). We recognize that, given certain circumstances, a perfectly valid law could be used improperly to stifle dissent. Cf. *Dombrowski* v. *Pfister,* 380 U.S. 479; *Cameron* v. *Johnson, supra,* 390 U.S. at 621. However, such circumstances are not present here. Petitioner was declared to be a delinquent not because he expressed dissent,

---

duct intended to express a disapproval is broad; it can extend from a thumbs-down gesture to political assassination. Would anyone seriously contend that the First Amendment protects the latter?" (367 F. 2d at 79).

but because he violated an important regulation, the enforcement of which "is unrelated to the suppression of free expression" and which "furthers an important" and "substantial governmental interest".

B. APPLICATIONS OF THE DELINQUENCY REGULATIONS IS NOT PUNISHMENT

The non-punitive nature of the delinquency procedures is discussed at length in our brief in the companion case of *Gutknecht* v. *United States,* No. 71, this Term. We think it important, however, to reiterate here that the regulations do not impose punishment but are a non-criminal device designed to bring the registrant into compliance with his duties under the law. As already noted, they provide that should a registrant fail to perform certain duties required by law (defined as including the regulations, see 32 C.F.R. 1602.10), he may be declared to be a delinquent, reclassified I–A and ordered to report for induction with the highest priority (32 C.F.R. 1642.4, 1642.12, 1631.7). Thus, the delinquency regulations render self-defeating any attempt by the registrant to cut himself off from the system and evade service. But, unlike a criminal penalty which is irreversible, a delinquency may be removed at any time up to actual induction once the registrant brings himself back into compliance. The regulations are thus remedial rather than punitive, designed to correct rather than to punish.

In essence, then, the delinquency regulations are analogous to the civil contempt sanction since they are a means whereby registrants are encouraged to

perform their duties under the pertinent laws and regulations.[22] They are designed merely to regulate conduct, not to punish. This is why petitioner's analogy to *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, must fail. In that case the Court held that automatic forfeiture of citizenship was punishment and could not be imposed without according the individual various constitutional safeguards. However, unlike the situation in *Mendoza-Martinez* (where once the forfeiture was triggered it could not be retrieved), a registrant's delinquency status may be cured by compliance. Moreover, as already noted, the delinquency procedures have built-in administrative safeguards which grant a registrant who has been reclassified the right of a personal appearance and an appeal. Furthermore, his classification may be reopened without regard to the normal restrictions against reopening (32 C.F.R. 1642.14). The superficial similarities between the tests the *Mendoza-Martinez* Court used to determine the penal nature of the sanction there imposed (372 U.S. at 108–109) and the at-

[22] We recognize that the analogy to civil contempt may be incomplete since the regulations leave it to the local board's discretion whether to remove the delinquency (see 32 C.F.R. 1642.4(c)). However, as we point out in our brief in *Gutknecht*, a local draft board's refusal to permit a registrant, acting in good faith, to bring himself into compliance with the regulations and thereby remove his delinquency would be an abuse of discretion. Indeed, an automatic removal provision might very well encourage repetitious and willful disregard of the regulations by a registrant who knows that temporary com-

tributes of the delinquency regulations are thus really beside the point.[23]

Penal statutes punish past actions—the robber is not allowed to undo the robbery, *Mendoza-Martinez* was not allowed to undo his violation of 1940 draft law (going to Mexico to evade service) with its attendant consequences under the immigration laws. On the other hand, the delinquency regulations, like civil contempt, are wholly remedial and are designed to secure compliance without punishment. Petitioner has failed to bring himself into compliance. In short, he has carried "the keys" to the restoration of his II–S deferment in his own pocket, but has not seen fit to use them. *In re Nevitt,* 117 Fed. 448, 461 (C.A. 8).

While the delinquency regulations are designed to ensure compliance with the Selective Service law short of the imposition of criminal sanctions, it is clear that should a registrant fail to cure his delinquency, a sanc-

---

pliance would force the removal of his delinquency. The local boards have been properly given discretion in this regard.

[23] As Mr. Justice Jackson noted in a different context, "one man's comfort and inspiration is another's jest and scorn" (*Board of Education* v. *Barnette*, 319 U.S. 624, 633). So it is with what constitutes punishment. While service in the Armed Forces of this country has traditionally been considered a privilege and an accepted duty of citizenship, certainly those who have to be dragged off kicking and screaming do not look upon it quite so favorably. The induction process, however, has always been regarded as civil and conscription has never been conditioned on the existence of the usual prerequisites to the imposition of criminal sanctions. See, e.g., *McCoy* v. *United States*, 403 F. 2d 896 (C.A. 5); *Brown* v. *United States*, 401 F. 2d 769 (C.A. 5); *Fults* v. *United States*, 395 F. 2d 852 (C.A. 10); *United States* v. *Dicks*, 392 F. 2d 524 (C.A. 4); *Nickerson* v. *United States*, 391 F. 2d 760 (C.A. 10), certiorari denied, 392 U.S. 907.

tion accrues and he is ordered to report for induction as a priority inductee (32 C.F.R. 1631.7(a)(1)). However, at this stage the registrant may have the validity of his classification and induction determined by a civilian court with all of his Fifth and Sixth Amendments rights reserved. The registrant may either submit to induction and test the validity of his "classification or processing" by way of habeas corpus, or may refuse to submit and test it as a defense to his criminal prosecution. Thus, application of the delinquency regulations does not present any serious questions under the Fifth and Sixth Amendments since the rights protected by these constitutional provisions are available once the sanction imposed by the delinquency procedures actually accrues.[24]

C. PETITIONER WAS NOT DEPRIVED OF ANY PROTECTED RIGHT EVEN THOUGH HE RECEIVED HIS DELINQUENCY NOTICE AND HIS NOTICE OF RECLASSIFICATION ON THE SAME DAY

There is little merit to petitioner's contention that he was entitled to notice of his delinquency prior to his reclassification. The regulations require only that a delinquency must be declared prior to a reclassification. This was done here. The fact of a reclassifica-

[24] Analogy may be made to grand jury proceedings where, although an indictment with its attendant adverse consequences may result, there is no right to counsel, confrontation and cross-examination of witnesses or other safeguards which necessarily condition the imposition of punishment. See, *e.g.*, *In re Groban*, 352 U.S. 330, 333; *United States* v. *Scully*, 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897. However, once an indictment is returned, the defendant's constitutional rights are fully protected in the resulting criminal trial.

tion does not prevent the removal of the delinquency, which may be done "at any time" (32 C.F.R. 1642.4 (c)). Furthermore, the reclassified delinquent may contest the reclassification, and the underlying delinquency, at his personal appearance before his draft board (which may reopen the classification without regard to the normal restrictions against reopening) and in the course of his administrative appeals (32 C.F.R. 1642.14). Additionally, petitioner can hardly claim prejudice, for there has been no showing that he would in any event have attempted to cure his delinquency prior to his reclassification. In fact, petitioner has to date continually refused to comply with the regulations and maintain his registration certificate in his personal possession.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

JOHN N. MITCHELL,
Attorney General,
WILLIAM D. RUCKELSHAUS,
WILL WILSON,
Assistant Attorneys General,
MORTON HOLLANDER,
RALPH A. FINE,
Attorneys.

OCTOBER 1969.

APPENDIX A

Statutes and Regulations Involved

1. Pertinent statutory provisions provide as follows:

Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 460(b)(3)) provides:

* * * * *

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of this Appendix, 50 U.S.C. App.], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

* * * * *

Section 6(h)(1) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(h)(1)) provides:

* * * * *

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted

to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under section (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Pertinent provisions of the Selective Service regulations provide:

32 C.F.R. 1617.1 Effect of failure to have unaltered registration certificate in personal possession.

Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register.* * *

32 C.F.R. 1623.5 Persons required to have Notice of Classification (SSS Form No. 110) in personal possession.

Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification. * * *

32 C.F.R. 1642.4 Declaration of delinquency status and removal therefrom.

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a regis-

trant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perfom. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

32 C.F.R. 1642.12 Classification of delinquent registrant.

Any delinquent registrant between the ages of 18 years and 6 months and 26 years and any delinquent registrant between the ages of 26 and 28 who was deferred under the provisions of section 6(c)(A) of the Military Selective Service Act of 1967 which were in effect prior to September 3, 1963, and any delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was, or thereafter has been or may be, deferred under any other provision of section 6 of such Act, including the provisions of subsection (c)(2)(A) in effect on and after September 3, 1963, may be classified in or reclassified into Class I-A, Class I-A-O or Class I-O, whichever is applicable, regardless of other circumstances: *Provided,* That a delinquent registrant who by reason of his service in the Armed Forces is eligible for classification into Class IV-A may not be classified or reclassified into Class I-A, Class I-A-O or Class

I–O under this section unless such action is specifically authorized by the Director of Selective Service.

32 C.F.R. 1642.14. Personal appearance, reopening, and appeal.

(a) When a delinquent registrant is classified in or reclassified into Class I–A, Class I–A–O or Class I–O under the provisions of this part, a personal appearance may be requested and shall be granted under the same circumstances as in any other case.

(b) The classification of a delinquent registrant who is classified in or reclassified into Class I–A, Class I–A–O or Class I–O under the provisions of this part may be reopened at any time before induction or before the date he is to report for civilian work in the discretion of the local board without regard to the restrictions against reopening prescribed in section 1625.2 of this chapter.

(c) When a delinquent registrant is classified in or reclassified into Class I–A, Class I–A–O or Class I–O under the provisions of this part, an appeal may be taken under the same circumstances and by the same persons as in any other case.

APPENDIX B

Joint Statement of Attorney General Ramsey Clark and Director of Selective Service Lewis B. Hershey, Issued December 9, 1967

The Department of Justice has established a special unit in the Criminal Division to coordinate prompt prosecution of offenses against the Selective Service laws and related statutes. The responsibilities of this unit include prosecution of violations of provisions of the Selective Service law making it unlawful knowingly to counsel, aid, or abet others to refuse to register or serve, or knowingly to interfere by force or violence or otherwise with the administration of the System. This unit also has responsibility for prosecution of violations of the related statutes outlawing interference with the Armed Forces or obstruction of recruiting and enlistments. The special prosecution unit is under the direction of John Van de Kamp, formerly U.S. Attorney for the Central District of California and now Deputy Director of the Executive Office for U.S. Attorneys.

All U.S. Attorneys have been instructed to speed up investigation and prosecutorial recommendations on these cases. They have also been directed to cooperate with local law enforcement officials and to urge them to vigorously prosecute violations of local laws which may occur in demonstrations against the Selective Service System.

It has long been the law that a registrant who violates any duty affecting his own status (for example, giving false information, failing to appear for examination, or failing to have a draft card) may be

declared a "delinquent" registrant by his local draft board. Under consistent practice, information received by federal law enforcement officials regarding a registrant's own status is turned over to his local draft board for appropriate action. When a person is declared to be a delinquent registrant by his local board, he may be reclassified and become subject to the highest priority for induction if otherwise qualified. If he fails to step forward for induction, he is subject to prosecution by the Department of Justice. This procedure is firmly established, approved by the courts, and has been followed since the enactment of the 1948 Selective Service Act, as well as under earlier Selective Service Acts.

Lawful protest activities, whether directed to the draft or other national issues, do not subject registrants to acceleration or any other special administrative action by the Selective Service System. Activities which violate federal law will be dealt with under the procedures outlined above depending upon the nature of the conduct. The lawful exercise of rights of free expression and peaceful assembly have incurred and will incur no penalty or other adverse action. These rights are guaranteed by the Constitution. They are vital to the preservation of free institutions, which our men in Vietnam are fighting to protect.

No single statement can cover the myriad different factual situations presented by the conduct of individual registrants. In approaching these situations, we will continue to work to preserve the integrity and effective operation of the Selective Service System while fully protecting the constitutional rights of the registrants.

U.S. GOVERNMENT PRINTING OFFICE: 1969

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 65.—OCTOBER TERM, 1969

Timothy J. Breen, Petitioner, *v.* Selective Service Local Board No. 16, Bridgeport, Connecticut, et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January 26, 1970]

MR. JUSTICE BLACK delivered the opinion the Court.

This case raises a question concerning the right of a young man ordered to report for induction into the Armed Forces to challenge the legality of that order prior to reporting for duty. Petitioner Breen, while enrolled in the Berkeley School of Music in Boston, Massachusetts, was given a II–S student classification by his local draft board, and deferred from military service pursuant to the provisions of the Military Selective Service Act of 1967, 81 Stat. 100, 50 U. S. C. App. § 451 *et seq.* (Supp. IV). According to an agreed stipulation of facts, in November 1967, he surrendered his draft registration card to a minister at a public gathering "for the sole purpose of protesting United States involvement in the war in Vietnam." Shortly thereafter his local draft board declared he was "delinquent" for failing to have his draft card in his possession and at the same time reclassified him I–A—available for military service.[1] He appealed this reclassification to the appropriate Selective Service Appeal Board, and while that appeal was pend-

[1] This reclassification was undertaken pursuant to 32 CFR § 1642.12.

ing filed this suit in the United States District Court in February 1968, seeking an injunction against any possible induction into the Armed Forces on the ground that his delinquency reclassification was invalid. The respondent local board moved to dismiss the suit for want of jurisdiction, relying on § 10 (b)(3) of the Act which provides that:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeals boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . . ."[2] 50 U. S. C. App. § 450 (b)(3) (Supp. IV).

The District Court granted the motion to dismiss and Breen appealed that decision to the Court of Appeals.[3] While the appeal was pending, we rendered our decision in *Oestereich* v. *Selective Service Bd.*, 393 U. S. 233 (1968), holding that § 10 (b)(3) did not bar pre-induction judicial review in the circumstances presented in that case. Although Breen argued that *Oestereich* controlled his own case, the Court of Appeals affirmed the District Court's dismissal of the suit, with one judge dissenting, holding that *Oestereich* did not cover this case and § 10 (b)(3) therefore required dismissal of the suit. 406 F. 2d 636 (C. A. 2d Cir. 1969). We granted

---

[2] Although this provision would appear to preclude judicial review by habeas corpus after the registrant submitted to induction, we have already construed the statute to allow such review. *Oestereich* v. *Selective Service Bd.*, 393 U. S. 233, 235, 238 (1968).

[3] During the pendency of that appeal the Appeal Board upheld the reclassification and the local board then ordered Breen to report for induction. The induction order has been stayed pending decision in this case.

a petition for certiorari, 394 U. S. 997 (1969), and because we conclude that *Oestereich* does control this case, we reverse the judgment of the Court of Appeals.

In *Oestereich* a student preparing for the ministry surrendered his draft registration card in protest against the war in Vietnam and was reclassified as a "delinquent." He then filed suit seeking to enjoin his induction, claiming that he was being inducted contrary to the clear statutory requirement that students preparing for the ministry "shall be exempt from training and service" under the Act, 50 U. S. C. App. § 456 (g). We held in that case that since Congress had unambiguously said that students preparing for the ministry were not to be drafted, and since there was no indication in the statute that such exemptions could be denied for "delinquency," Oestereich's induction was unlawful and in such a case § 10 (b)(3) would not be interpreted to bar preinduction judicial review and thereby force the registrant to submit to an illegal induction or risk the possibility of a criminal prosecution to regain his exempt status.

In the present case petitioner Breen argues that he, like Oestereich, should not be inducted and he relies on § 6 (h)(1) of the Act, which provides that:

> "Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment." 50 U. S. C. App. § 456 (h)(1) (Supp. IV).

In his complaint Breen alleged that he was a 20-year-old student and argued that he was clearly qualified for a student deferment. The Government has never con-

tested Breen's factual allegations concerning his student status, nor has it argued that he is not qualified for such a deferment for any reason except the alleged "delinquency." As in *Oestereich*, we do not find any indication that Congress intended to allow the draft boards to deprive otherwise qualified students of their deferments for the reasons relied upon in this case.

In concluding that *Oestereich* did not control this case, the Court of Appeals felt that the reference in § 6 (h)(1) to "such rules and regulations as [the President] may prescribe" was an indication that Congress authorized revocation of student deferments for violations of the delinquency regulations. 406 F. 2d, at 638. That conclusion must be rejected for several reasons. The explicit language of the Act provides that the President "shall" provide for the deferment of undergraduate students except as otherwise provided by the terms of the Act itself, and Congress then set forth the specific conditions which a student must meet to qualify for such a deferment.[4] The reference to "rules and regulations" is clearly intended only to authorize such additional administrative procedures as the President may find necessary to insure that all qualified students are given the deferment which Congress provided in § 6. There is nothing in the language of the Act itself which indicates a congressional desire to allow the President to add to or subtract from the factors specified in the statute

[4] The Act also provides that student deferment status may be lost under certain conditions.

"A deferment granted to any person under [this provision] shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first." 50 U. S. C. App. § 456 (h)(1) (Supp. IV). There is no contention raised here that Breen has lost his deferred status for any of these statutory reasons.

for determining when students would be deferred.[5] The legislative history of § 6 (h)(1) clearly indicates that Congress intended that only the conditions specified in that section need be met to warrant a student deferment. Prior to the 1967 Act the draft law provided that student deferments were provided only according to presidential regulation and in practice such deferments were subject to the discretion of the local draft boards.[6] The committee reports and floor debates on the 1967 Act show that a primary purpose of the amendments was to eliminate this local option and provide clear, uniform standards for undergraduate student deferments.[7] When Congress thus acted to replace discretionary standards with explicit requirements for student deferments, it did not specifically provide or in any way indicate that such deferred status could be denied because the registrant failed to possess his registration certificate.[8] Finally, any contention that "delinquency" induction is proper in this case must be

---

[5] The Act does allow the President to restrict student deferments on a finding that the needs of the Armed Forces require such action, 50 U. S. C. App. § 456 (h)(1) (Supp. IV), but he has not made any such finding at this time.

[6] See Selective Service Act of 1948, § 6 (h), 62 Stat. 604, 611–612, as amended. The regulations promulgated pursuant to this authority permitted student deferments in the discretion of the local boards with certain suggested guidelines. See 32 CFR §§ 1622.25, 1622.25 (a) (1967 ed.).

[7] H. R. Rep. No. 267, 90th Cong., 1st Sess., 25–26 (1967); Conf. Rep. No. 346, 90th Cong., 1st Sess., reprinted in U. S. Code Cong. & Admin. News, 90th Cong., 1st Sess., 1352, 1356–1359 (1967); 113 Cong. Rec. 14093, 14095, 16434 (1967).

[8] The suggestion that the fleeting reference to "delinquents" in § 6 (h)(1) of the Act, 50 U. S. C. App. § 456 (h)(1) (Supp. IV), authorizes delinquency inductions must be rejected for the reasons set forth in *Oestereich, supra,* at 236–237, and in *Gutknecht* v. *United States, ante,* at —.

rejected for the reasons set forth in our decision in *Gutknecht* v. *United States, ante,* p. —, holding that induction pursuant to the delinquency regulations has not been authorized by Congress.

The Attorney General advances another argument for distinguishing this case from *Oestereich, supra.* He points out that Oestereich met the requirements for a statutory "exemption" from military service, while Breen is at best qualified only for a statutory "deferment." On the basis of this observation he urges that the provisions of § 10 (b)(3) preclude pre-induction judicial review in all cases of deferments and that *Oestereich* provides an exception only in certain cases where an exemption is claimed. We fail to see any relevant practical or legal differences between exemptions and deferments. The effect of either type of classification is that the registrant cannot be inducted as long as he remains so classified. Congress has specifically said that the only persons who may be inducted into the Armed Forces are those "who are liable for such training and service and who at the time of selection are registered and classified, *but not deferred or exempted.*" 50 U. S. C. App. § 455 (a)(1) (Supp. IV).[9] (Emphasis added.) Thus it is clear that the crucial distinction in draft classifications is between individuals presently subject to induction and those who are not so subject, either because of deferment or exemption.

The Attorney General also argues that a rational distinction exists in the statutory scheme between deferments which merely postpone the time when a registrant will serve and exemptions which place the registrant "outside the manpower pool." Brief for the Respondent, at 20–21. A careful reading of the entire Act indicates that no such consistent distinction is preserved. Con-

[9] This statutory directive is implemented by 32 CFR § 1631.7.

gress has provided that "[n]o . . . exemption or deferment . . . shall continue after the cause therefor ceases to exist." 50 U. S. C. App. § 456 (k). Many of the "exemptions" are not absolute, as the Attorney General implies, but conditioned on certain factors. Thus an exempt ministerial student like Oestereich will lose that exempt status if he withdraws from study in preparation for the ministry. Similarly exempt veterans can be inducted into the Armed Forces if Congress declares a war or national emergency. 50 U. S. C. App. § 456 (b). On the other hand there is absolutely no assurance that an individual who is simply deferred will only have his military obligation postponed. So long as a registrant remains in a deferred classification he cannot be inducted, and deferment past the maximum age of draft liability would effectively exempt the registrant from compulsory military service. Although a registrant like Breen cannot be deferred as an undergraduate student past his 24th birthday,[10] he may continue to be deferred on the basis of extreme hardship to dependents or employment in the national interest. 50 U. S. C. App. § 456 (h)(1) (Supp. IV). There is thus no statutory scheme to permanently exempt certain individuals while only deferring service for others. Both deferments and exemptions accomplish the same congressional purpose, that of not inducting certain registrants at a particular time.

We are consequently unable to distinguish this case from *Oestereich.* In both situations a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service. In both cases the order for induction involved a "clear departure by the Board from its statutory mandate." *Oestereich, supra,* at 238, and in both cases § 10 (b)(3)

[10] See n. 4, *supra.*

of the Act should not have been construed to require the registrants to submit to induction or risk criminal prosecution to test the legality of the induction order. The judgment below is reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1969

Timothy J. Breen, Petitioner, *v.* Selective Service Local Board No. 16, Bridgeport, Connecticut, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January 26, 1970]

Mr. Justice Harlan, concurring.

While I fully agree with today's holding that pre-induction review is available to the petitioner here, and subscribe to much of the Court's opinion, I would rest the holding on a different footing.

The Court's opinion here, as in *Oestereich* v. *United States*, 393 U. S. 233 (1968), appears to make the availability of pre-induction review turn on the lawfulness of the draft board's action, or to put it another way, on the certainty with which the reviewing court can determine that the registrant would prevail on the merits if there were such judicial review of his classification. On the other hand, under the test put forward in my concurring opinion in *Oestereich*, 393 U. S. 239–245, the availability of pre-induction review turns not on what amounts to an advance decision on the merits, but rather on the nature of the challenge being made.

In *Oestereich*, the registrant sought pre-induction review of claims that the delinquency procedure employed by the board was "not authorized by any statute," was "inconsistent with his statutory exemption," and was "facially unconstitutional," 393 U. S., at 239. I pointed out that judicial scrutiny of such legal contentions, unlike the review of "factual and discretionary decisions" pertaining to a board's classification of a

particular registrant, presented no "opportunity for protracted delay" in the operations of the Selective Service System—the primary congressional concern in enacting § 10 (b)(3), 393 U. S., at 241. To avoid the "serious constitutional problems" implicit in depriving a registrant of "his liberty without the prior opportunity to present to any competent forum" his claims that the delinquency procedure was invalid, 393 U. S., at 243, I therefore interpreted § 10 (b)(3) not to preclude preinduction judicial review. Viewed from the perspective of my concurring opinion in *Oestereich*, this case is indistinguishable for the petitioner here, as in *Oestereich*, makes legal challenges to the delinquency procedure that do not require review of a factual and discretionary decision of a board.

As to the merits of petitioner's challenges, I agree, for the reasons stated by the majority, that it makes no difference that through the operation of the delinquency regulations Breen lost a II–S student deferment whereas Oestereich lost a IV–D exemption as a divinity student preparing for the ministry. More generally, the delinquency regulations used here have now been held to be unauthorized by statute, *Gutknecht* v. *United States*, — U. S. — (1970).

On this basis, I concur in the reversal of the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1969

Timothy J. Breen, Petitioner, *v.* Selective Service Local Board No. 16, Bridgeport, Connecticut, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January 26, 1970]

Mr. Justice Brennan, concurring.

In *Oestereich* v. *Selective Service Board*, 393 U. S. 233 (1968), I joined Mr. Justice Stewart's dissent expressing the view that § 10 (b)(3) was designed to permit judicial review of draft classifications only in connection with criminal prosecutions or habeas corpus proceedings. 393 U. S., at 245. But continued adherence to that construction is foreclosed by the Court's holding in that case that § 10 (b)(3) did not preclude pre-induction judicial review of the case of a registrant entitled to a statutory exemption. Therefore, because I too "fail to see any relevant practical or legal differences between exemptions and deferments," I join the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

No. 65.—OCTOBER TERM, 1969

Timothy J. Breen, Petitioner, *v.* Selective Service Local Board No. 16, Bridgeport, Connecticut, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January 26, 1970]

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, concurring in part.

For the reasons expressed by MR. JUSTICE BRENNAN, I join the opinion of the Court insofar as it holds that the District Court had jurisdiction to entertain the petitioner's suit and should have granted him the injunction he sought. I do not, however, join the Court's opinion insofar as it holds that the delinquency regulations have not been authorized by Congress. See *Gutknecht* v. *United States, ante,* p. — (concurring opinion).